No. 12-50028

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE JOE GUTIERREZ,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

United States v. Jesse Joe Gutierrez
No. 12-50028

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Jesse Joe Gutierrez,** Defendant-Appellant;

2. **Robert Pitman,** U.S. Attorney;

3. **Douglas Gardner,** Assistant U.S. Attorney, who represented Plaintiff-Appellee in the district court;

4. **Henry J. Bemporad,** Federal Public Defender;

5. **William H. Ibbotson,** Assistant Federal Public Defender, who represented Defendant-Appellant in the district court; and

6. **Philip J. Lynch,** Assistant Federal Public Defender, who represents Defendant-Appellant in this Court.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

s/ Philip J. Lynch
PHILIP J. LYNCH
Attorney for Defendant-Appellant

REQUEST FOR ORAL ARGUMENT

Jesse Gutierrez requests oral argument. Gutierrez challenges the district court's order that he be forcibly medicated in an attempt to restore him to competence. Oral argument would assist the Court's resolution of that challenge.

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SUBJECT MATTER AND APPELLATE JURISDICTION

1. **Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of alleged offenses against the laws of the United States. The district court had jurisdiction of the case under 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from the United States District Court for the Western District of Texas. The district court ordered that Gutierrez be involuntarily medicated. Orders requiring involuntary medication are appealable under the collateral-order doctrine. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Sell v. United States*, 539 U.S. 166, 176–77 (2003); *United States v. White*, 431 F.3d 431, 432–33 (5th Cir. 2005).

Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 14 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. In this case, the written judgment was entered on January 10, 2012, and notice of appeal was filed the same day.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by ordering that Gutierrez be forcibly medicated in order to render him competent for trial, when the Government had not followed the regulation it was ordered to follow.
2. Whether the district court erred in finding that forcibly medicating Gutierrez would not violate his liberty interests.

STATEMENT OF THE CASE

1. Nature of the Case.

The district court ordered that Jesse Gutierrez be subjected to involuntary psychotropic medication in an effort to render him competent to stand trial on charges that he had made threats. Gutierrez argues on appeal that the order should be vacated because the Government failed to follow the plain procedures set out in the applicable Bureau of Prisons's (BOP) regulation governing requests for involuntary medication. The regulation's language had been reinforced by this Court's order that the regulation be followed in evaluating Gutierrez. *United States v. Gutierrez*, 2011 WL 4807760 (5th Cir. 2011). Gutierrez also argues that the order must be vacated because the circumstances of this case show that the Government's interest in prosecution is not sufficient to overcome his liberty interest and thus this is not one of the "rare" cases in which involuntary medication for competency is justified. *Sell v. United States*, 539 U.S. 166, 180 (2003).

2. Course of Proceedings and Disposition in the Court Below.

In 2009, Gutierrez was charged with making threats against the president, two former presidents, and a federal law enforcement officer. (1 R. 7–9,

24–26.)[1] After a criminal complaint was filed, and before an indictment was filed, Gutierrez's mental status was questioned, and the Government moved for a hearing on his competence and sanity. (1 R. 19–20.) The district court ordered a psychiatric examination. *See* 18 U.S.C. §§ 4241 and 4242. (1 R. 32–33.)

Gutierrez was examined by a BOP doctor and, on February 1, 2010, the district court found Gutierrez not competent and ordered him committed to the custody of the Attorney General to determine if there were a substantial probability that he would regain competency. (1 R. 34–36.) Several months later, BOP psychiatrists reported that Gutierrez remained incompetent. (1 R. 37, 43.)

Defense counsel filed a notice of intent to assert an insanity defense. (1 R. 38–41.) Government counsel filed a motion for a hearing to consider whether Gutierrez should be forcibly medicated to restore him to competency. (1 R. 42–45.) Gutierrez opposed holding such a hearing, on the ground that the Government had not complied with the applicable regulation. (1 R.

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1. The record is cited as "[volume number] R. [page number]." The Supplemental Record is cited as "[volume number] S.R. [page number]." The page numbers for the First Supplemental Record refer to the number in the upper right-hand corner of the page. The page numbers for the Second Supplemental Record refer to the number in the upper right-hand corner of the page. The exhibits are cited as "Def. Ex. [number]."

47–48.) The district court held the hearing, after which it ordered that Gutierrez be involuntarily medicated in an attempt to restore him to competency. (1 R. 56–64.) Gutierrez appealed. (1 R. 74–75.)

This Court vacated the medication order. It held that the BOP had not followed its regulation governing the authorization of involuntary medication for restoring competence and remanded the case for compliance with the regulation. The district court returned Gutierrez to the BOP for a hearing under the regulation. A hearing was held, but the psychiatrist conducting the hearing, following the advice of BOP lawyers, declined to make the required necessity finding under 28 C.F.R. § 549.43(a)(5).

The district court set another medication hearing, the Government affirmed that it still wanted Gutierrez forcibly medicated, and Gutierrez again opposed the motion. (2 S.R. 55, 137–52.) The district court recognized that the BOP had declined to make the finding required under the regulation. It nonetheless again ordered that Gutierrez be involuntarily medicated. (2 S.R. 190–212.) Gutierrez appeals.

3. Statement of Facts.

Gutierrez suffers from schizophrenia. Twice in 2007, he was admitted to the psychiatric ward of Austin State Hospital. (1 S.R. 6–7.) Both admissions

were characterized by paranoid delusional beliefs. Gutierrez was last discharged from the State Hospital on January 23, 2008. (1 S.R. 6–7.)

A year or so after leaving the hospital, Gutierrez went off his medication and again became delusional. On August 27, 2009, Gutierrez called U.S. Secret Service Agent Nguyen Vu. Proclaiming a "message from God," Gutierrez threatened Vu, President Obama, former Presidents George W. Bush and George H.W. Bush, and "all lawyers." The threats were recorded on Vu's voicemail. (1 R. 8–9, 24–26, 57).[2]

That call got Gutierrez arrested and charged with making threats. Gutierrez's poor mental health was evident, and the Government immediately moved for a competency examination. (1 R. 19–20, 32–33.) The district court granted the request, and asked the doctors to assess Gutierrez both for competency to stand trial and for sanity at the time of the telephone call. (1 R. 32–33.)

The doctors at FMC Butner, where Gutierrez had been sent, diagnosed Gutierrez's illness as schizophrenia, exhibiting paranoid delusions and hallucinations. The Government moved for an order that Gutierrez be

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2. Between November 12 and December 1, 2008, Gutierrez had made over 100 phone calls to a television station in Austin, Texas. (1 R. 57). In those calls, Gutierrez threatened to harm or kill former President George W. Bush, his wife Laura Bush, Texas Governor Rick Perry, and his wife Anita Perry. (*Id.*).

involuntarily medicated to restore him to competency. (1 R. 42–45.)[3] After a hearing, the district court entered an order authorizing involuntary medication to restore Gutierrez to competence for trial. (1 R. 56–64). Gutierrez appealed. This Court vacated the involuntary-medication order and sent the case back to the district court "with instructions to remand the case to the BOP for a due process hearing on competency in accordance with the 1992 regulations." 2011 WL 4807760 at *9.

The applicable regulation was 28 C.F.R. § 549.43. On remand, the BOP, following the advice of its legal staff, instructed Dr. Jean Zula, the psychiatrist who conducted the hearing, not to make the finding required by § 549.43(a)(5). See (2 S.R. 246–51, 255–56). Section 549.43(a)(5) states, in pertinent part, that "[t]he psychiatrist conducting the hearing shall determine whether treatment or psychotropic medication is necessary in order to attempt to make the inmate competent for trial[.]"

After the BOP proceedings, the district court set a hearing. (2 S.R. 55.) Gutierrez moved for his release on the ground that the delays caused by the Government have unreasonably prolonged his pretrial confinement, in violation of due process. (2 S.R. 85–96.) Gutierrez again objected that the

3. The BOP did not comply with the district court's order for a sanity evaluation. Its doctors preferred to do sanity evaluations on competent persons. (1 S.R. 15–16.)

Government had failed to follow the regulation, pointing out that no finding has been made that forcible medication was necessary. (2 S.R. 137–52.) Before hearing testimony on the issue, the district court observed that "[t]he thing that concerns me, though, is that they did not do a *Sell* hearing. Nobody made a determination other than to say he couldn't make one[.]"[4] (2 S.R. 228.)

The Government then called Dr. Jean Zula, the chief psychiatrist at Butner. (2 S.R. 229.) Dr. Zula had discussed with "our legal staff" what was required under the remand. (2 S.R. 246, 248.) She acknowledged that "what the regulation requires to be addressed is that the involuntary medication is necessary and medically appropriate." (2 S.R. 247.) She testified that she "did not" address those issues. (2 S.R. 247, 256.) She did not address them because, in BOP's view, subsection (a)(5) of the regulation "is no longer applicable." (2 S.R. 249.)

Though she and the BOP legal staff disagreed with this Court that the regulation applied to Gutierrez, Dr. Zula did conduct an administrative hearing. She explained that forcible medication was not "medically necessary" for Gutierrez and that "I could not find that he could be involuntarily treated." (2 S.R. 234–35.) She did check a box indicating that

4. *Sell v. United States,* 539 U.S. 166 (2003).

treating Gutierrez with involuntary medication would be "in the patient's best interest." (Zula Report at 8.) She did not make a finding that medication was necessary to make him competent because "years ago, the Bureau changed its policy . . . [so] that we could no longer treat someone involved internally . . . to make them competent to stand trial." (2 S.R. 234.) Zula opined that she did not have the authority to say that Gutierrez should be involuntarily medicated: "this process does not apply to restoring someone to competence. So therefore, I couldn't comment that under this process that I can say he should be involuntarily treated to restore him to competency. That is no longer part of this hearing. That is now a judicial decision since the Supreme Court *Sell* decision." (2 S.R. 242.)

She said that her testimony at the district court hearing was based on the plan proposed by Dr. Carlton Pyant, the treating psychologist. (2 S.R. 241–42.)[5] Zula estimated that treatment with the recommended medication

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5. Her reliance on Dr. Pyant's plan was clear. In response to the prosecutor's question whether it was "necessary to give him or provide [sic] involuntary medication to allow him to get to that point," Zula answered at the hearing "In my opinion that's the only thing that will get him to that point[.]" (2 S.R. 236–37.) The prosecutor was reading to Zula the opinion of Dr. Carlton Pyant from July of 2010 that involuntary medication was "necessary" because other treatments were "unlikely to achieve substantially the same results of restoring him to competency." (2 S.R. 236.) That opinion was offered in a report in which Dr. Pyant was a treating psychologist, not a neutral hearing officer, and Zula did not make a

(continued…)

would have a 75% chance of restoring Gutierrez to competency. She explained that, while the medications could have side effects, the doctors would monitor Gutierrez and intervene if they saw side effects. (2 S.R. 240–41.)

The first examination of Gutierrez, after his competency was questioned, had been performed by Dr. Jeremiah Dwyer in 2009. Dr. Dwyer in his December 15, 2009 report had opined that his preliminary assessment was that Gutierrez did not appreciate the wrongfulness of his actions at the time of the offense. (Dwyer Report.) At the 2012 hearing, Dr. Pyant testified that "I don't think that if he were competent that there would be substantially different information that he would provide that would lead us to a conclusion that he was not insane at the time of the offense." (2 S.R. 254.)[6] Pyant later told the district court that "we still don't exactly know during the specific time frame that the alleged offenses occurred what his mental state was." (2 S.R. 262.)

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5. (…continued)
necessity finding while acting as a neutral hearing office.

6. Dr. Zula had declined to make findings regarding Gutierrez's sanity at the time of the offense or his prospects for civil commitment, although defense counsel had specifically requested that she opine on those subjects. (2 S.R. 246–47; Def. Ex. 4.)

Dr. Robert Cantu testified as an expert witness for Gutierrez. Cantu had examined Gutierrez and reviewed his records. Cantu found that Gutierrez suffered from a "severe mental illness" and that "he was unable to appreciate the nature and quality of the" acts alleged against him. (2 S.R. 269.)

At the end of the hearing, the district court, in response to Gutierrez's argument that the BOP had not made the required finding under subsection (a)(5) stated "Well, [BOP] made it clear they can't make those findings out. Why I don't know. But that's what they say, they can't make it. So it would have to be futility to send him back." (2 S.R. 280.) The court also stated "If [Gutierrez] returns to rational thinking . . . you're going to have a non-jury trial. I'm going to find him not guilty as a result of incompetency, just as I have others over the years. I have never had one that wasn't, particularly with schizophrenia. And then we will supervise him, and he will probably be in a halfway house where they can monitor medications." (2 S.R. 281.) Counsel disagreed that there was a significant government interest in forcibly medicating Gutierrez to try him, given that no one thought Gutierrez would be found guilty. (2 S.R. 282.) The Court responded "there's a big

governmental interest. There is a governmental interest in having Mr. Gutierrez have a life." (2 S.R. 283.)[7]

In its written order, the district court found that, although the 1992 regulation had not been entirely followed, the Government had "substantially complied" and had therefore exhausted its administrative remedies. (2 S.R. 201.) The court pointed to the recommendation that "involuntary medication is approved as in the patient's best interest." (2 S.R. 202.) Because "the BOP is acting under the guidance of Department of Justice lawyers in this matter, [who] believe they have no authority under *Sell* to actually order" forced medication, "any further proceeding before the BOP would serve no useful purpose." (2 S.R. 203.)[8]

The Court then found that involuntary medication was justified under the *Sell* criteria. The court cited two governmental interests in favor of the order. The first was that Gutierrez was charged with felony offenses. According to the court, the lodging of felony charges was, by itself, sufficient to establish

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7. Defense counsel countered that forcible medication in a criminal case was not permitted to obtain a better life. (2 S.R. 283.) The district court did not identify what federal power gave either the Government or an individual exercising federal power an interest in "having Gutierrez have a life."

8. Gutierrez's counsel moved after the hearing to compel discovery of the communications from the BOP lawyers to the administrator and to Dr. Zula. That motion was denied. (2 S.R. 329–45.)

the important governmental interest. (2 S.R. 194.) The district court dismissed Gutierrez's argument that there was no important Government interest in prosecuting a mentally ill person for making threats that he could not (and almost certainly will not) be held accountable for. (2 S.R. 194–95); see also (2 S.R. 229, 281) (court all but guarantees it will acquit Gutierrez). "This argument in essence invites the Court to second guess the Supreme Court's decision in *Sell*, something this Court cannot do. The Supreme Court has already decided that the Government can have a sufficiently important interest in bringing an incompetent defendant to trial to override the defendant's liberty interest in avoid medication. The rule in *Sell* would be a dead letter if courts accepted Gutierrez's argument[.]" (2 S.R. 195.)

The second was that the "government has an interest in avoiding alternatives to forced medication and trial." (2 S.R. 194.) The court did not address whether Gutierrez would be a candidate for civil commitment if he was not brought to trial. The district court also found that involuntary medication would further the government's interests, that there were no alternative less intrusive treatments, and that administration of the drugs was medically appropriate. (2 S.R. 195–99.) It ordered that Gutierrez be forcibly medicated. (2 S.R. 212.)

SUMMARY OF THE ARGUMENTS

I. The District Court's Forced-Medication Order Should Be Vacated Because the Government Failed to Comply With the Pertinent Regulation.

The district court ordered that Jesse Gutierrez be involuntarily medicated to try to restore him to competence to face charges of making threats over the telephone. That order was erroneous. The Government, contrary to the explicit, unambiguous order of this Court in *United States v. Gutierrez*, 2011 WL 4807760 (5th Cir. 2011), declined to follow the regulation applicable to forcible medication. The district court excused this declination. This Court should not. The language of the regulation is plain, as was the language of this Court's mandate. To allow the Government to avoid its duty under the law would encourage agency disregard of regulations and would minimize Gutierrez's constitutional rights. The Court should vacate the district court's forcible medication order.

II. The Government Failed to Show That It Has a Sufficiently Important Interest in Forcibly Medicating Gutierrez to Try Him.

If the Court considers the propriety of the forcible-medication order, it should vacate the order for two reasons. First, the district court misapprehended and misapplied the first *Sell* factor. It failed to consider whether there were special circumstances that lessened the Government's

interest in prosecution to the degree that forcible medication was not warranted. The district court's failure to consider the circumstances of Gutierrez's case rendered both its legal conclusion that Government had a sufficient interest in forcible medication and its factual finding that forcible medication would further that interest flawed.

Second, even if the district court's misapplication of *Sell* is excused, the record demonstrates that the Government failed to bear its burden under the first *Sell* factor. Before a person can be subjected to forcible medication, an important governmental interest must be shown. It is not enough that a serious charge has been lodged and that the Government wishes to proceed to trial. The court must go beyond the mere fact of the charge and examine the particular circumstances of the case to determine whether special circumstances are present that lessen the importance of the Government's interest. In this case, such circumstances are present. The district court failed to weigh the circumstances, including the possibility of civil confinement, the time Gutierrez has already spent in custody, and the near-certitude that Gutierrez will be found not guilty by reason of insanity. The district court therefore erred by concluding that there was a significant governmental interest allowing Gutierrez's liberty interest to be overridden. The involuntary-medication order should be vacated.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT'S FORCED-MEDICATION ORDER SHOULD BE VACATED BECAUSE THE GOVERNMENT FAILED TO COMPLY WITH THE PERTINENT REGULATION.

Gutierrez has suffered from a serious, delusion-causing mental illness for years. In 2009, that illness caused him to make telephonic threats against the president of the United States and others, believing that those threats came from God and had to be delivered. Delivery was made on the voicemail of an Austin-based U.S. Secret Service agent.

Gutierrez's message brought criminal charges against him. His mental illness quickly resulted in a finding that he was incompetent to face those charges. The Government has obtained an order from the district court authorizing forcible medication to try to restore Gutierrez to competency. That order was improper. The Government, contrary to the explicit, unambiguous order of this Court, declined to follow the regulation applicable to forcible medication. The district court shrugged off this declination, observing that the Government had said it would not make the required finding and reasoning that, because the Government had declined to, there was no point in requiring it to. (2 S.R. 203.)

This Court should not endorse the Government's declination to follow the instructions it was given. The language of the regulation is plain, as was the

language of this Court's mandate. The Government was not free to ignore them in favor of its own convenience or beliefs. To allow the Government to do so flouts the law and trivializes Gutierrez's constitutional rights. The Court should vacate the district court's forcible medication order.

A. Standard of Review.

In reviewing a district court's order to forcibly medicate a defendant, this Court reviews findings of fact for clear error and conclusions of law de novo. *United States v. White*, 431 F.3d 431, 433 (5th Cir. 2005).

B. The Government Failed to Comply With the Regulation as Ordered by This Court.

This Court in its prior opinion specifically instructed the BOP that it was to hold a "due process hearing on competency in accordance with the 1992 regulations." 2011 WL 4807760 at *9; *see also United States v. White*, 431 F.3d 431, 433–34 (5th Cir. 2005) (regulatory scheme is "designed to protect an inmate's due process rights" and must be followed before a request for judicial oversight under *Sell*). The pertinent 1992 regulation is 28 C.F.R § 549.43. On remand, the BOP, following the advice of its legal staff, instructed the psychiatrist conducting the administrative hearing not to make the finding required by 28 C.F.R. § 549.43(a)(5). (2 S.R. 247–50, 255–56, 201–03, 280.) Section 549.43(a)(5) states, in pertinent part, that "[t]he

psychiatrist conducting the hearing shall determine whether treatment or psychotropic medication is necessary in order to attempt to make the inmate competent for trial[.]"

The BOP's declination to make the finding required by the regulation that this Court specifically directed it to follow requires vacation of the forcible-medication order. The BOP is not free to disregard either its regulations or specific instructions from this Court. *See Gutierrez*, 2011 WL 4807760 at *5–*9 (remanding for hearing in accordance with regulation); *see also Chevron Oil Co. v. Andrus*, 588 F.3d 1383, 1386 (5th Cir. 1979) ("unremarkable proposition that an agency must abide by its own regulations"). In ruling that the BOP had "substantially complied" with the regulation—despite recognizing the agency's deliberate declination to apply subsection (a)(5) of the regulation (2 S.R. 201–03, 280)—the district court erred.

Section 549.43 is "straightforward." *Gutierrez,* 2011 WL 4807760 at *3. Under it, the BOP may seek to forcibly administer psychotropic medication for two reasons: (1) because the inmate is a danger to himself or others or (2) because medication is necessary "in order to attempt to make the inmate competent for trial." 28 C.F.R. § 549.43(a)(5). Before medication for competency restoration may be forcibly given, the BOP must obtain a

determination from a hearing officer that the medication is "necessary" for the reason that it is being sought. *Id.* at § 549.43(a)(3), (5).

This Court instructed the BOP to follow the regulation. *Gutierrez*, 2011 WL 4807760 at *9. The BOP's legal staff and Dr. Zula simply declined to do what they were told to do by this Court. They substituted their view of the law for the mandate of the Court. See (2 S.R. 249) (Zula declares (a)(5) "is no longer applicable.") That they were not free to do.[9]

Dr. Zula's explanation of why she did not do as the Court instructed was a repetition of the argument advanced by the Government in the prior appeal—she said that *Sell* had displaced the regulation and prevented her from making the finding. (2 S.R. 242.)[10] This Court explicitly rejected that

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9. The jurisprudential doctrine of exhaustion applies to § 549.43. Gutierrez, 2011 WL 4807760 at *4; *White*, 431 F.3d at 434. In the first appeal of this case, the Court made clear that the Government was required to exhaust the procedures of § 549.43 and that no extraordinary circumstances excused exhaustion. *Gutierrez*, 2011 WL 4807760 at *5–6. There was no evidence that any institutional inadequacy or impairment prevented Dr. Zula from making the finding required under the 1992 regulation. Mere disagreement with the Court does not constitute an extraordinary circumstance.

10. In his reply brief in the prior appeal, counsel underestimated the Government's persistence. Counsel wrote that "[e]xhausting administrative remedies does not involve asking the agency to decide the first *Sell* factor. The regulation requires a neutral psychiatrist acting as a hearing officer to determine whether forced psychotropic medication is necessary as a medical matter to restore competence. 28 C.F.R. § 549.43(a)(3), (5). The first *Sell* factor is not relevant to (continued…)

argument in the prior appeal. The Court wrote "consistent with our statements in *White*, we now hold that *Sell* did not overrule the 1992 regulations, and the government was required to comply with them." 2011 WL 4807760 at *4.

The prior panel went on to reject the Government's argument that the BOP's new regulation, which would have excused it from the requirements of the 1992 version of § 549.43 could be applied to Gutierrez. The Court specifically ruled that the new regulation could not be applied because to do so would have an "improper retroactive effect." 2011 WL 4807760 at *9. The BOP, guided by "Department of Justice lawyers," (2 S.R. 203), simply ignored these commands and substituted its own judgment that it would apply only those portions of the 1992 regulations that fit its policy view. Since subsection (a)(5) did not fit its policy view, the BOP declined to make the finding the subsection required. The BOP was not permitted to substitute its view of the law for the Court's ruling. Nor should the district court have excused this substitution on the ground that, because BOP and its lawyers

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10. (…continued)
that determination. Thus there is no reasonable possibility that a hearing officer acting under the regulation would refuse to decide what § 549.43 tasks him with deciding on the ground that he is being asked to decide the first *Sell* factor. He is not." Gutierrez Reply Br. 15–16 (No. 11-50146).

declined to follow the regulation, it would be futile to send the matter back and make them follow the regulation. (2 S.R. 202–03.)

The prior panel made clear that the 1992 regulations secured important procedural due process rights. It made it clear that agencies may not "flout in-force regulations." Those facts alone are sufficient to justify vacating the order for the failure to follow the regulation. But the failure to comply with the regulation also impaired the very due process rights the regulation is meant to secure. An administrative, medical determination about the necessity of forced medication is not a pointless exercise. Had the reviewing psychiatrist in *Sell* never ordered that involuntary medication was necessary, or had the reviewing psychiatrist's order not been "upheld" on administrative appeal, the defendant would not have needed to seek the district court's intervention to protect his liberty interest in avoiding forcible medication. Here, Dr. Zula could say only that medication was in Gutierrez's best interests, but that is a far cry from necessity.

Whether a proposed treatment is "necessary" depends not only on its effectiveness and medical appropriateness, but on whether there are no less intrusive alternative means of achieving the same results and no less intrusive means of administering the drugs. *Sell*, 539 U.S. at 181. Indeed, Dr. Zula admitted she could not say the medication was medically necessary. (2 S.R.

247, 249.) The failure to make the required necessity finding also undermined the efficacy of Gutierrez's administrative appeal. Without the finding, he could not appeal the crux of the case.[11] *See* 28 C.F.R. § 549.43(a)(6), (7) (administrative appeal).

The district court thought it would be futile to send the case back to the BOP in light of the refusal of BOP and its lawyers to comply with the regulation. The district court was wrong. Sending the case back to the BOP and insisting the BOP do what it is required to do is far from futile. It achieves three important purposes. It furthers the rule of law. It "prevents general disregard for agency procedures that could ultimately weaken the agency's effectiveness." *White*, 431 F.3d at 434. It safeguards Gutierrez's right to be free from involuntary medication. The forcible-medication order should be vacated. The BOP should be ordered to comply with the regulation and the ruling of this Court.

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11. In his appeal, Gutierrez hit in his first sentence upon the most important matter in the case—necessity. He wrote to Warden Sara Revell who was handling the appeal "I don't need medicine." (2 S.R. 172.) Revell did not, in her response, address the necessity of forced medication.

II. THE GOVERNMENT FAILED TO SHOW THAT IT HAS A SUFFICIENTLY IMPORTANT INTEREST IN FORCIBLY MEDICATING GUTIERREZ TO TRY HIM.

Should this Court instead decide that compliance with the regulation was either proved or excused, it should still vacate the forced medication order. This is so for two reasons. First, the district court misapprehended and misapplied the first *Sell* factor. It failed to consider whether there were special circumstances that lessened the Government's interest in prosecution to the degree that forcible medication was not warranted. The district court's failure to consider the particular circumstances of the case meant that both its legal conclusion that Government had a sufficient interest in forcible medication and its factual finding that forcible medication would further that interest were flawed. Second, even if the district court's misapplication is excused, the record demonstrates that the Government failed to bear its burden under the *Sell* test.

A. Standard of Review.

This Court reviews findings of fact for clear error and conclusions of law de novo. *White*, 431 F.3d at 433. The determination that "the government's asserted interests are sufficiently important" to justify forcible medication is a legal issue. *United States v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007).

B. The District Court Misapplied the *Sell* Test.

"'When the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense." *United States v. White*, 620 F.3d 401, 409 (4th Cir. 2010) (quoting *United States v. Bush*, 585 F.3d 806, 813 (4th Cir. 2009)). "An individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" *Sell*, 539 U.S. at 178 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). That right may be overridden in "rare," "limited circumstances," if the Government can demonstrate the factors set forth by the *Sell* court. 539 U.S. at 169, 179–80. In this case, the forcible medication order cannot stand.

In *Sell*, the Court explained that, when determining whether forcible medication is warranted, the courts must consider four factors: (1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate. *Id.* The Government must present "clear and convincing" evidence of all four factors. *United States v. Green*, 532 F.3d 538, 545 (6th Cir. 2008).

The *Sell* Court stated that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important." 539 U.S. at 180. The district court cited this statement in ruling that the Government had proved it had an interest in forcibly medicating Gutierrez and thus had satisfied the first *Sell* factor. (2 S.R. 194–95.) The court, however, misread the *Sell* opinion and thus did not undertake the analysis it was required to. The court wrote that "The Supreme Court has already decided that the Government can have a sufficiently important interest in bringing an incompetent defendant to trial to override the defendant's liberty interest in avoiding medication. The rule in *Sell* would be a dead letter if courts accepted Gutierrez's argument [that prosecution of an insane Gutierrez]" was not a sufficiently important interest." (2 S.R. 195.)

It is true that the mere fact of a felony charge is the beginning of a showing of a government interest that may satisfy the first *Sell* factor. But, contrary to the district court's belief, the *Sell* court did not hold that the mere allegation of a serious offense was enough to automatically satisfy the first factor. The *Sell* court made clear that it was not. It went on to say that "[c]ourts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." 539 U.S. at 180.

The district court misread *Sell*. The *Sell* opinion makes it obvious that the circumstances of a particular case may lessen the Government's general interest in prosecution. Such circumstances include the fact that the failure to take drugs voluntarily could result in "lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime," and the "possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed." 539 U.S. at 180.[12] Both these factors are present in Gutierrez's case, but the district court relied simply on the misapprehension that *Sell* meant that a qualifying prosecution was enough. If this were true, there would be no reason for a significant government interest to be one of the *Sell* factors. It would simply be established in every case that the prosecution was a significant interest. It is not. The circumstances of the particular case matter.

The district court's failure to consider the particular circumstances of Gutierrez's case means that it did not do its job under the first prong of the *Sell* test. Failing to do that meant that the district court could not fulfill its job

12. Gutierrez notes that in saying this the *Sell* court assumed a crime. Actions occurred, but the determination that the actions were a crime is for the jury or, at a non-jury trial, the judge.

under the second *Sell* factor. It could not make a finding that "that involuntary medicine will *significantly further* those concomitant state interests" because it had not adequately assessed the existence of the asserted interest. *See* 539 U.S. at 181 (emphasis original); *cf. United States v. Ruiz-Gaxiola*, 623 F.3d 684, 694–96 (9th Cir. 2010) (reversing forcible medication order because district court's finding that medication furthered the government's interest was unsupported.) The district court's order should be vacated and the case should be remanded for further proceedings.

C. The Government Failed to Show That It Has a Sufficiently Important Interest in Forcibly Medicating Gutierrez to Try Him.

The forcible medication order must be vacated because the district court erred in concluding that the first *Sell* factor was met. It was not. The special circumstances of Gutierrez's case demonstrate that the Government does not have an interest sufficient to overcome Gutierrez's liberty interest in remaining free from involuntary medication.

Before ordering that a person be subjected to forcible medication, a "court must find that *important* governmental interests are at stake." *Sell*, 539 U.S. at 180. The *Sell* Court explained that, generally, the Government has an important interest in bringing to trial someone who is accused of a serious crime, because "the Government seeks to protect through application of the

criminal law the basic human need for security." *Id*. (citing *Riggins v. Nevada*, 504 U.S. 127, 135–36 (1992)). However, the existence of a serious charge is not sufficient for a forcible-medication order. A court must go beyond the mere fact of the charge and examine the particular case to determine whether it presents "[s]pecial circumstances" that "may lessen the importance of" the Government's interest and lead to the conclusion that the interest is insufficient to justify medicating a particular accused. *Sell*, 539 U.S. at 180. Among the circumstances that may reduce the Government's interest are confinement in a mental institution as a consequence of a refusal to take psychiatric medication voluntarily, "the possibility that the defendant has already been confined for a significant amount of time," and the timeliness of the prosecution. 539 U.S. at 180. In this case, all three of these factors weigh against medicating Gutierrez, as do the possible effect of the medication on Gutierrez's defense and the near-certitude that Gutierrez will be found not guilty by reason of insanity. See (2 S.R. 195) (district court "has little doubt that Gutierrez will ultimately be found insane"). The district court therefore erred by concluding that there was a significant governmental interest allowing Gutierrez's liberty interest to be overridden.

The district court determined that "[o]nly one alternative exists if Gutierrez does not become competent and cannot be prosecuted: he will spend

the rest of his life in a hospital." (2 S.R. 194.) A permanently incompetent defendant must be civilly committed or, in the alternative, released. *See* 18 U.S.C.A. §§ 4241(d), 4246; *United States v. Ecker*, 78 F.3d 726, 728 n.1, 731 (1st Cir. 1996); *United States v. West*, No. 03-cr-128-WYD, 2007 WL 1851305, at *6-*7, unpub. op. (D. Colo., June 26, 2007). Assuming that the district court is right that Gutierrez will have to be civilly committed for "the rest of his life" if he is not made competent to stand trial in this case, that fact lessens the Government's interest in prosecution.[13] The potential of future civil confinement "diminish[es] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime," *Sell*, 539 U.S. at 180, and affects the strength of the government interest in prosecution.

Gutierrez has already spent 31 months in custody—the vast majority of it in the Butner psychiatric facility. He is not likely to be healed soon. The testimony from both the Government doctors and Gutierrez's expert, Dr. Robert Cantu, was that Gutierrez suffers from a severe mental illness, is incompetent, and is unlikely to recover without medicine. (2 S.R. 266–71); see also Dwyer Report at 12; (1 S.R. 28–29). The strong likelihood that Gutierrez will continue to be institutionalized means that a special

13. Civil commitment would require a finding that Gutierrez's release would create a danger. 18 U.S.C. § 4246. The BOP doctors have not found Gutierrez dangerous in the institution.

circumstance recognized in *Sell*—time in an institution for failing to voluntarily take medicine—is present and dilutes Government interest in prosecuting Gutierrez.

The second factor that lessens the Government's interest in prosecuting Gutierrez is found in the circumstances surrounding the amount of time Gutierrez has been in custody on the criminal charges—31 months at this writing. That time is longer than the likely sentence that Gutierrez would receive for the offenses with which he is charged if he were ever to be found guilty. As Gutierrez pointed out in his motion for release, the likely advisory guideline range for his offense would be 15 to 21 months imprisonment.[14] (2 S.R. 92 n.7); s*ee Sell*, 539 U.S. at 180 (long period of confinement may lessen government interest); *White*, 620 F.3d at 413–19 (considering, in reversing forcible medication order, the likely sentence that *White* would receive). That the Government has already detained Gutierrez longer than it would have had it brought him to trial weighs against forcibly medicating him now. The medication regimen would take months and the trial proceedings

14. Based on the available information, it appears that Gutierrez's total offense level would be 12 and that his criminal history category would be III. See U.S.S.G. §2A6.1(a), (b)(2)(A), §3E1.1(a). Even without acceptance of responsibility, his guideline range would be only 21 to 27 months' imprisonment.

would occur only after that. In these circumstances, the Government's interest in bringing him to trial is greatly lessened.

This is particularly so because the length of time the charge has been pending is attributable to failures to comply with clear-cut rules. The BOP refused to follow its regulation; the Department of Justice attempted to validate that refusal in the prior appeal. That attempt was rejected. *Gutierrez*, 2011 WL 4807760 at *5–*9. The BOP was given unambiguous instructions by the court of appeals; they did not follow them.[15] The *Sell* court observed that the government has an interest in timely prosecution. 539 U.S. at 180. The Government, through its own behavior, has dragged this prosecution out to the point where its dilatoriness now must count against it.[16] The Government-caused delays weigh against its interest in bringing this aging case to trial at the expense of Gutierrez's right to be free from the "alter[ing]" of his "will and [his] mind." *White*, 620 F.3d at 409.

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15. This is true, even if the Court rules that the district court was correct that the Government's efforts cleared the substantial-compliance bar. The BOP did not do as it was instructed, and that occasioned more litigation.

16. Indeed, Gutierrez moved for his release on the ground that the delays caused by the Government have unreasonably prolonged his pretrial confinement, in violation of due process. (2 S.R. 85–96); *cf. Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In its involuntary-medication order, the district court denied that motion.

The third factor diminishing the Government's interest in forcibly medicating Gutierrez to try him is its "concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Sell*, 539 U.S. at 180. Here, the Government seeks to medicate Gutierrez with antipsychotic drugs that will treat and diminish his paranoid delusions and hallucinations. Such treatment may unfairly undermine Gutierrez's insanity defense in two ways. First, it may affect a medical evaluation of whether Gutierrez appreciated the wrongfulness of his conduct. Second, it may affect his appearance, his manner, his demeanor, and the substance of any testimony he may give. That forcible medication, at this late date, may diminish the effectiveness of Gutierrez's defense lessens the government interest.

Finally, this is not a case in which the concept of ordered liberty requires a trial. This is so because all of the available evidence suggests that Gutierrez was insane at the time of the alleged offenses, and is insane now. In such special circumstances, the Government does not have a sufficiently important interest in trying him.[17] While "ordered liberty" ordinarily requires that the

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17. Again, this conclusion springs from the particular circumstances of this case. It is possible to imagine an offense by a person all agree was and is insane—perhaps the assassination of a public official—in which the societal interest in having a trial, even one sure to end in a not guilty by reason of insanity verdict, would justify forcible medication. Sometimes society needs that public order and

(continued…)

Government be able to bring an accused to trial, *Allen*, 397 U.S. at 347 (Brennan, J., concurring), it does not require that the Government be able to proceed against someone, like Gutierrez, who was, and is, incapable of understanding the wrongfulness of his acts.

In Gutierrez's case, the court must consider whether the concepts underlying ordered liberty are implicated in the particular case. *Sell*, 539 U.S. at 180 (special circumstances of individual case must be considered). The *Sell* Court borrowed the "ordered liberty" concept from Justice Brennan's opinion in *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring). In *Allen,* an unruly defendant bent on disrupting the proceedings was removed from the courtroom after being repeatedly warned that he would be removed if he persisted in his conduct. The Supreme Court held that the defendant had lost his right to be present at trial. Concurring, Justice Brennan observed that the "constitutional right to be present can be surrendered if it is abused for the purpose of frustrating the trial." Justice Brennan's fundamental-to-ordered -liberty principle was directed against the idea that an obstreperous or determined defendant could disrupt and frustrate

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17. (…continued)
catharsis. This case is not such a case. Gutierrez made telephone calls, something not warranting drastic measures to bring him to trial.

society's interest in trying him.[18] Liberty, manifested through the Sixth and Fourteenth Amendments gave Allen a right to be at his trial. Ordered liberty allowed his knowing surrender of that right to be judicially enforced when balanced against the interest of society in trying him on criminal charges. That ordered liberty favors the government's interest in bringing someone to trial does not mean that the government may always and everywhere force every person to trial.

When, as with Gutierrez, a person is unable to comprehend his actions or the trial and is overwhelming likely to be found not guilty by reason of insanity, there is no significant government interest. The significant, essentially uncontested, evidence is that Gutierrez was insane at the time of the charged offenses. Defense expert Robert Cantu evaluated Gutierrez and opined that he was insane at the time of the offense. (2 S.R. 269–70.) In December 2009, Dr. Dwyer of the BOP rendered a "preliminary assessment" that Gutierrez "did not appreciate the wrongfulness of his actions at the time of the offense.[19] (Dwyer Report.) At the first *Sell* hearing in this case, BOP

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18. No one has claimed that Gutierrez's long-standing mental condition is a ploy aimed at frustrating the trial. When defense counsel asked Dr. Cantu about the possibility of malingering, the district court rebuked counsel: "Well, nobody's ever contended that he's faking, so your wasting my time." (2 S.R. 273.)

19. On September 18, 2009, the district court ordered an evaluation to (continued…)

psychiatrist Dr. Kwanna Williamson agreed that Gutierrez had mental problems that precluded him from understanding the wrongfulness of his acts, and that, based on the available information, it was possible to infer that Gutierrez was insane at the time of the alleged offenses. (1 S.R. 28–29.) She also testified that "nothing significantly had changed" with respect to his mental condition since his previous hospitalization (which ended in January of 2008). (1 S.R. 7.)

At the 2012 hearing, BOP psychologist Dr. Carlton Pyant was asked whether there was "a lot of information that he meets the criteria for being insane," Pyant answered, "Based on the information that we have, I would think the answer would be yes. There is quite a bit of information." (2 S.R. 254.) Pyant then testified that, based on the information he had, it was unlikely that his opinion would change: "Based on the information that I have, the answer would be no. I don't think that if he were competent that there would be substantially different information that he would provide that

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19. (…continued)
determine whether Gutierrez "was insane at the time of the offense charged." (1 R. 32–33.) The BOP did not comply with that order. This is so, apparently, even though there is no statutory requirement that a defendant be fully competent before he is evaluated for criminal responsibility. *See* 18 U.S.C. § 4242. The BOP explained that it prefers to do sanity profiles on medicated inmates. (1 S.R. 15–16.) A preferred protocol is not sufficient reason for forcible medication. Dr. Cantu was able to perform a sanity evaluation on the unmedicated Gutierrez. (2 S.R. 266–71.)

would lead us to a conclusion that he was not insane at the time of the offense." (2 S.R. 254.)[20] Pyant later backed off some, telling the district court that "we still don't exactly know during the specific time frame that the alleged offenses occurred what his mental state was." (2 S.R. 262.)

The district court has repeatedly expressed belief that Gutierrez is and was insane and will be found not guilty. *See, e.g.*, (2 S.R. 195). At the 2012 hearing, the court, which had seen all the reports and heard all the testimony said "they [the lawyers] can play around all they want, but he's never going to be convicted of this criminal offense." (2 S.R. 275.) The court all but guaranteed an acquittal: "You're going to have a non-jury trial. I'm going to find him not guilty as a result of incompetency, just as I have others over the years . . . and then we will supervise him, and he will probably be in a halfway house where they can monitor his medications." (2 S.R. 281.)

If, as seems not just overwhelming likely, but almost certain, Gutierrez is brought to trial and is found not guilty by reason of insanity, he "shall" be civilly committed to a mental hospital. *See* 18 U.S.C. § 4243(a). If the Government is seeking civil commitment, it ought to have first explored the

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20. Dr. Zula had declined to make findings regarding Gutierrez's sanity at the time of the offense or his prospects for civil commitment, although defense counsel had specifically requested that she opine on those subjects. (2 S.R. 246–47; Def. Ex. 4.)

possibility of having Gutierrez committed under 18 U.S.C. §§ 4241(d) and 4246, without resorting to forced medication with psychotropic drugs. *See Sell*, 539 U.S. at 180 (potential for future commitment weighs against forced medication); *see also Palmer*, 507 F.3d at 301 (after defendant was found incompetent to stand trial, and psychiatrists concluded he was suffering from a delusional disorder, defendant was first "referred for an evaluation to determine whether he was eligible for civil commitment under 18 U.S.C. § 4246"). But the Government has not sought to have Gutierrez evaluated for civil commitment. Instead, it has sought, inappropriately, to have him forcibly medicated to for the purpose of standing trial. In light of Gutierrez's asserted defense and the availability of other means of restraint and the other special circumstances of this case, the Government has not demonstrated, by clear and convincing evidence, that it has a sufficiently weighty interest in medicating him. The district court's forcible medication order should be reversed.

CONCLUSION

FOR THESE REASONS, the Court should vacate the involuntary medication order and remand to the district court for further appropriate proceedings.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 2012, I electronically filed the Brief with the Clerk of Court using the CM/ECF system which will send notification of such filing to Robert Pitman, U.S. Attorney for the Western District of Texas (Attn: Assistant U.S. Attorney Joseph H. Gay Jr.), via electronic mail.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by FED. R. APP. P. 32(a)(7)(B)(iii), this brief contains 8294 words printed in a proportionally spaced typeface.

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March 27, 2012.