No. 12-50028

In the

United States Court of Appeals
For the Fifth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

JESSE JOE GUTIERREZ,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES

JOHN MURPHY
Attorney for the United States,
Acting Under Authority Conferred
By 28 U.S.C. § 515

DOUGLAS W. GARDNER
Assistant United States Attorney
Western District of Texas

LANNY A. BREUER
Assistant Attorney General

JOHN D. BURETTA
Acting Deputy Assistant Attorney
General

JOHN M. PELLETTIERI
Attorney, U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W.
Rm. 1264
Washington, D.C. 20530
(202) 307-3766

STATEMENT REGARDING ORAL ARGUMENT

The government does not oppose defendant's request for oral argument.

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INTRODUCTORY STATEMENT

Defendant Jesse Joe Gutierrez has been charged with threatening to kill President Barack Obama, former Presidents George H.W. Bush and George W. Bush, and a U.S. Secret Service agent. He currently is not competent to stand trial and refuses antipsychotic medication to treat his mental illness. The government accordingly seeks judicial approval to administer the medication involuntarily so that the case against Gutierrez may proceed.

The district court has twice entered orders approving involuntary medication after holding hearings in accordance with Sell v. United States, 539 U.S. 166 (2003). This Court vacated the first order upon concluding that BOP first had to hold an administrative hearing to consider if "medication [is] justified as a medical determination." United States v. Gutierrez, 443 Fed. Appx. 898, 903 (5th Cir. 2011) (unpublished). After BOP held its hearing and determined that involuntary medication to restore Gutierrez to competency is in Gutierrez's best medical interest, the district court held a second Sell hearing and entered another involuntary medication order.

Gutierrez asks this Court to remand for another administrative hearing, arguing that the BOP hearing on competency restoration was deficient. BOP medical officials complied with the applicable regulations, however, and

medical opinion is unanimous that treatment with antipsychotic medication is medically proper. It is therefore now appropriate for this Court to address Gutierrez's narrow challenge to the merits of the district court's Sell order, namely his claim that important government interests do not justify his involuntary medication. The government respectfully requests that this Court reject Gutierrez's challenge and allow this prosecution to proceed.

JURISDICTIONAL STATEMENT

The district court entered an order requiring Gutierrez's involuntary medication on January 10, 2012. SR2 190-212 (order).[1] Gutierrez filed a timely notice of appeal. SR2 213 (notice of appeal); see Fed. R. App. P. 4(b)(1)(A)(i). The district court had jurisdiction under 18 U.S.C. § 3231. The district court's order is an appealable collateral order. Sell, 539 U.S. at 176. This Court's jurisdiction therefore rests on 28 U.S.C. § 1291. See, e.g., United States v. Sarabia, 661 F.3d 225, 228-29 (5th Cir. 2011).

STATEMENT OF THE ISSUES

1. Whether BOP adequately complied with its 1992 regulations when it held a hearing to consider involuntary medication to make Gutierrez

[1] "R" refers to the record on appeal. "SR1" refers to the first supplement to the record on appeal. "SR2" refers to the second supplement to the record on appeal. "Br." refers to defendant's brief. "Dkt." refers to district court docket entries. "GRE" refers to the government's record excerpts.

competent to stand trial.

2. Whether important governmental interests justify the involuntary medication of Gutierrez to make him competent to stand trial.

STATEMENT OF THE CASE

On September 15, 2009, a federal grand jury in the Western District of Texas returned an indictment charging Gutierrez with threatening to kill and inflict bodily harm upon President Barack Obama, in violation of 18 U.S.C. § 871; threatening to kill and inflict bodily harm upon former Presidents George W. Bush and George H.W. Bush, in violation of 18 U.S.C. § 879; and threatening to assault and murder a Special Agent of the United States Secret Service with the intent to retaliate against the agent on account of the performance of the agent's official duties, in violation of 18 U.S.C. § 115. R 24-25 (indictment). The district court found that Gutierrez was not competent to stand trial and, after a hearing, entered an order compelling Gutierrez's involuntary medication. R 56-64 (order). This Court vacated the order and remanded for additional proceedings. Gutierrez, 443 Fed. at 908; see SR2 24-42 (opinion). On January 10, 2012, after additional proceedings, the district court again entered an order requiring Gutierrez's involuntary medication to make him competent to stand trial. SR2 190-212 (order). This appeal followed.

STATEMENT OF FACTS

I. Legal Background

A. The Insanity Defense Reform Act of 1984

Under the Insanity Defense Reform Act of 1984, enacted after John Hinckley's attempt to kill President Ronald Reagan, if a district judge finds that a defendant is not competent to stand trial, the court must commit the defendant to the custody of the Attorney General. 18 U.S.C. § 4241(d); see Shannon v. United States, 512 U.S. 573, 577 (1994) (discussing statute's background). The Attorney General must hospitalize the defendant for treatment and restoration to competency. 18 U.S.C. § 4241(d).

If a defendant is still not competent for trial after a prescribed period of time or if the charges have been dismissed for reasons solely related to the defendant's mental condition, the district court must hold a hearing to determine whether the defendant should be committed. 18 U.S.C. § 4246(a); see 18 U.S.C. § 4241(d). If the district court finds by "clear and convincing evidence" that the defendant's release would "create a substantial risk of bodily injury to another or serious damage to property of another," the defendant must be committed to the custody of the Attorney General for hospitalization in a state or federal facility. 18 U.S.C. § 4246(d).

If a defendant is made competent and raises an insanity defense at trial, he has the burden under the Insanity Defense Reform Act of proving by "clear and convincing evidence" that at the time of the offense he "was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17. If the defendant is found not guilty by reason of insanity, the district court must commit the defendant to a suitable facility and hold a hearing within 40 days to determine whether he is eligible for release. 18 U.S.C. §§ 4243(a), (c) & (e). The defendant bears the burden of proving his eligibility for release by showing that "his release would not create a substantial risk of bodily injury to another person or serious damage of property of another." 18 U.S.C. § 4243(d).

B. Involuntary Treatment of Inmates on Dangerousness Grounds: Washington v. Harper

While in the Attorney General's custody, inmates have a constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs." Washington v. Harper, 494 U.S. 210, 221 (1990). In Harper, the Supreme Court concluded that the government may nonetheless involuntarily treat an inmate with antipsychotic drugs "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." 494 U.S. at 227.

Harper further concluded that a judicial hearing was not required before

prison officials could forcibly administer medication to Harper on dangerousness grounds because the administrative procedures Washington prison officials followed afforded Harper with due process. 494 U.S. at 228-36. Under the Washington procedures, an inmate was entitled to a hearing before a panel of three prison officials not involved in the inmate's treatment (a psychiatrist, a psychologist, and a prison administrator); the inmate had to receive advance notice of the hearing; the inmate was entitled to be present at the hearing, present evidence, cross- examine witnesses, and receive assistance from a lay adviser; the psychiatrist and at least one other member of the panel had to determine that the inmate was gravely ill or a danger to himself or others; and the inmate had the right to appeal the decision to the superintendent of the correctional center. Id. at 215-16.

C. The 1992 BOP Regulations

In 1992, in light of Harper, the Bureau of Prisons (BOP) enacted regulations adopting procedures similar to those that Harper deemed sufficient to do away with the need for a judicial hearing. See Administrative Safeguards for Psychiatric Treatment and Medication, 57 Fed. Reg. 53820-01 (proposed Nov. 12, 1992) (to be codified at 28 C.F.R. § 549.43). The 1992 regulations specified that before prison officials could order involuntary medication and

forcibly administer medication to an inmate, a hearing had to be conducted by a psychiatrist who was not currently involved in the inmate's diagnosis or treatment. 28 C.F.R. § 549.43(a)(3) (2010). Under the regulations, the inmate was entitled to advance notice of the hearing, to assistance from a staff representative, and to present evidence at the hearing. 28 C.F.R. §§ 549.43(a)(1) & (2) (2010).

Although Harper addressed involuntary medication due to grave disability or dangerousness, the BOP regulations also purported to authorize BOP to forcibly administer medication to make an inmate competent for trial. Under the regulations, the non-treating psychiatrist who conducted the hearing had to "determine whether treatment or psychotropic medication [1] is necessary in order to attempt to make the inmate competent for trial or [2] is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison." 28 C.F.R. § 549.43(a)(5) (2010). The psychiatrist had to "prepare a written report regarding the decision," id., and the inmate was entitled to appeal the decision to prison administrators, 28 C.F.R. § 549.43(a)(6) (2010).

D. Involuntary Treatment of Inmates on Competency Grounds: Sell v. United States

In 2003, in Sell v. United States, 539 U.S. 166 (2003), the Supreme Court held that the government may involuntarily administer antipsychotic drugs to a mentally ill criminal defendant for the sole purpose of making the defendant competent to stand trial only if a court finds that:

(1) "important governmental interests are at stake," id. at 180;

(2) "involuntary medication will *significantly further* those concomitant state interests," *i.e.*, "administration of the drugs is substantially likely to render the defendant competent to stand trial," id. at 181 (emphasis in original);

(3) "involuntary medication is *necessary* to further those interests," *i.e.*, "any alternative, less intrusive treatments are unlikely to achieve substantially the same results," id. (emphasis in original); and

(4) "administration of drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition," id. (emphasis in original).

Courts sometimes refer to these as the four "Sell factors." United States v. Palmer, 507 F.3d 300, 303 (5th Cir. 2007).

Sell further explained that a court need not consider involuntary medication on competency grounds "if forced medication is warranted for a different purpose, such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's own

interests where refusal to take drugs puts his health gravely at risk." 539 U.S. at 182. The "need to consider authorization on trial competence grounds will likely disappear," the Court explained, if "a court authorizes medication on these alternative grounds." Id. at 183. Thus, a court "asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial . . . should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other Harper-type grounds; and, if not, why not." Id.

E. This Court Adopts an Administrative Exhaustion Requirement In United States v. White

In United States v. White, 431 F.3d 431, 435-36 (5th Cir. 2005), this Court held before the government may ask a district court to hold a hearing under Sell and order involuntary medication to make a defendant competent to stand trial, BOP must conduct administrative proceedings under the 1992 regulations. Id. 435-36 . The Court grounded this ruling in the administrative exhaustion doctrine and Sell's admonition about first considering medication on Harper grounds. Id. at 434.

Specifically, under White, before a district court can hold a Sell hearing to determine whether involuntary medication is warranted on competency restoration grounds, BOP must first hold a hearing under the 1992 regulations

to determine whether involuntary medication is warranted on Harper grounds; that is, whether involuntary medication is "necessary because the inmate is dangerous to self or others [or] is gravely disabled." 28 C.F.R. § 549.43(a)(5) (2010); see White, 431 F.3d at 435-36. If the hearing officer determines that involuntary medication is warranted on Harper grounds, BOP may proceed to involuntarily medicate the defendant without a judicial hearing. Harper, 494 U.S. at 228-36. As a practical matter, administering the medication to alleviate grave disability or dangerousness will likely also make the defendant competent for trial, obviating the need to determine whether involuntary medication is independently warranted on competency restoration grounds. See Sell, 539 U.S. at 181-83; White, 431 F.3d at 435.

II. Proceedings Below

A. Gutierrez is Indicted for Threatening to Kill the President and Others

Gutierrez made repeated phone calls to a Texas television station in which he threatened to harm or kill then-President George W. Bush and Governor Rick Perry, as well as their wives Laura Bush and Anita Perry. After Agent Nguyen Vu of the United States Secret Service visited Gutierrez about the calls, Gutierrez left a message on Agent Vu's voice mail saying he had received a command from God and was going to kill Agent Vu, President

Obama, and former Presidents George W. Bush and George H.W. Bush. R 8, 24-26, 57.

Gutierrez was arrested in August 2009 and charged with threatening to kill President Obama, in violation of 18 U.S.C. § 871; threatening to kill former Presidents George W. Bush and George H.W. Bush, in violation of 18 U.S.C. § 879; and threatening to kill Agent Vu, in violation of 18 U.S.C. § 115. R 11 (warrant); R 24-26 (indictment).

B. The District Court Finds That Gutierrez is Not Competent to Stand Trial

Upon motion by the government, the district court ordered a psychiatric evaluation of Gutierrez to determine whether he was competent to stand trial and whether he was insane at the time of the charged offenses. R 32-33 (order). Jeremiah Dwyer, Ph.D., a forensic psychologist, evaluated Gutierrez and determined that Gutierrez suffered from Schizophrenia, Paranoid Type and could not understand the nature and consequences of the proceedings against him or assist in his defense. Dkt. 17, at 6-9, 12 (Dwyer Report). Dr. Dwyer declined to offer an opinion about Gutierrez's mental state at the time of the offenses, concluding that he could not provide a "thorough assessment" in light of Gutierrez's current mental state. Id. at 12.

On the basis of Dr. Dwyer's report, the district court concluded that

Gutierrez was not competent to stand trial. The court accordingly committed Gutierrez to the custody of the Attorney General to be hospitalized for treatment and restoration to competency, in accordance with 18 U.S.C. § 4241(d). R 35-36.

C. BOP Determines That Involuntary Medication is Not Warranted on Harper Grounds and Refers the Matter to the District Court for a Sell Hearing

On March 8, 2010, Gutierrez was admitted to the Mental Health Department of the Federal Medical Center in Butner, North Carolina. GRE 3 (Williamson-Pyant Report, July 28, 2010). Kwana Williamson, M.D, and Carlton Pyant, Ph.D., were assigned to care for him. GRE 23 (Newman Report, July 28, 2010).

Dr. Pyant and Dr. Williamson diagnosed Gutierrez with Schizophrenia, Undifferentiated Type. After Gutierrez refused medication, Dr. Pyant and Dr. Williamson highly recommended that Gutierrez by involuntarily treated with antipsychotic medication. GRE 33 (Williamson-Pyant Report, July 21, 2010). According to the doctors, there were no less intrusive means that would be effective in achieving restoration of his mental competency. Id.

Dr. Pyant and Dr. Williamson did not believe that Gutierrez was a danger to himself or others within the institutional setting of FMC Butner.

GRE 6 (Williamson-Pyant Report, July 28, 2010). Nonetheless, to comply with the administrative exhaustion requirements announced in White, a non-treating psychiatrist, Ralph Newman, M.D., conducted a hearing under the 1992 regulations to determine whether involuntary medication was warranted on the Harper grounds of dangerousness or grave disability. GRE 13. As anticipated, Dr. Newman concluded that Gutierrez was neither gravely disabled nor a danger to himself or others at FMC Butner. GRE 23, 27 (Newman Report, July 28, 2010); Dkt. 35, at 18 (hearing transcript).

Dr. Newman did not consider whether involuntary medication was warranted to make Gutierrez competent to stand trial. Instead, Dr. Pyant and Dr. Williamson sent a report to the district court requesting that the court hold a hearing and enter an order under Sell authorizing involuntary treatment of Gutierrez with antipsychotic medication. GRE 12-13, 20 (Williamson-Pyant Report, July 28, 2010).

The report provided a detailed assessment of three of the four Sell factors. The report noted that the first factor, whether important governmental interests are at stake, "is strictly within the domain of the Court and will not be addressed here." Id. at 11. With respect to the other three factors, the report concluded that (1) treatment with antipsychotic medication is substantially

likely to render Gutierrez competent to stand trial, GRE 13-15; (2) involuntary medication is necessary because alternative, less-intrusive means would be unlikely to restore Gutierrez to competency, GRE 15; and (3) treatment with antipsychotic medication, and in particular a specific course of treatment with the drug Risperdal Consta, is medically appropriate, GRE 15-20.

D. The District Court Holds a Sell Hearing and Orders Involuntary Medication

The district court held a hearing on January 12, 2011, to determine whether to order involuntary medication for competency restoration. Dr. Williamson testified at the hearing and explained the recommendations in her report. She testified, *inter alia*, that non-pharmacological treatments were not a viable alternative to medication, Dkt. 35, at 10 (hearing transcript), and that without medication there was no probability Gutierrez would be returned to competency, id. at 12.[2] The defense offered no evidence and stated it would offer "no contrary testimony with regard to" the Sell factors. Id. at 31, 33.

In an order dated February 3, 2011, the district court concluded that involuntary medication was justified in light of the Sell factors. R 60-63. With

[2]Dr. Williamson also testified that the effects of Gutierrez's mental illness made it difficult to address his mental state at the time of the offense. According to Dr. Williamson, participation of a competent defendant is the preferred method for evaluating sanity at the time of the offense. Dkt. 35, at 16 (hearing transcript).

regard to the first Sell factor, the court made the legal determination that the government had a strong interest in bringing Gutierrez to trial. R 60. The court also found that the remaining Sell factors were satisfied. The court concluded that the record evidence established that medicating Gutierrez is substantially likely to return him to competency, R 60-61; that less intrusive treatments are not viable, and there is no chance of Gutierrez regaining competency without medication, R 62; and that administration of antipsychotic drugs is in Gutierrez's best interest in light of his medical condition, R 62-63.

E. Gutierrez Appeals the Involuntary Medication Order

Gutierrez appealed. He argued that before the district court could enter an involuntary medication order under Sell, BOP was required to hold a hearing under the 1992 regulations to determine whether his involuntary medication was warranted on competency grounds. Gutierrez, 443 Fed. Appx. at 900-01. He also argued, under the first Sell factor, that important government interests did not justify his involuntary medication. Id. at 904. Gutierrez did not challenge the district court's determination with regard to the remaining three Sell factors. Id.

1. Amended BOP Regulations Take Effect

On August 12, 2011, while Gutierrez's appeal was pending, amended

BOP regulations went into effect. Under the new regulations, a BOP hearing officer can order involuntary medication only if it determines that "the inmate is dangerous to self or others, poses a serious threat of damage to property affecting the security or orderly running of the institution, or is gravely disabled (manifested by extreme deterioration in personal functioning)." 28 C.F.R. § 549.46(a)(7) (2012).

Thus the new regulations omit the language that purported to authorize BOP to forcibly administer medication (without a judicial hearing) for competency restoration. See Psychiatric Evaluation and Treatment, 73 Fed. Reg. 33957, 33958 (proposed June 16, 2008) (to be codified at 28 C.F.R. § 549). The current regulations make clear that the BOP hearing procedures do "not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial." 28 C.F.R. § 549.46(b)(2) (2012). As set forth in the regulations, "[o]nly a Federal court of competent jurisdiction may order the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial." Id.

2. This Court Vacates the Order and Remands for Additional Administrative BOP Proceedings

In a decision dated October 11, 2011, this Court vacated the district

court's Sell order and remanded for further proceedings. Extending the administrative exhaustion requirement announced in White, the Court concluded that BOP had to hold a hearing "on competency in accordance with the 1992 regulations" before the government could seek an involuntary medication order in the district court under Sell. 443 Fed. Appx. at 908. The Court concluded that the futility exception to the exhaustion doctrine was not applicable. Id. at 902-05.

Although the new BOP regulations had gone into effect, the Court determined that the 1992 regulations applied to Gutierrez on remand. The Court accordingly concluded that enactment of the new BOP regulations, which omit the language allowing BOP to consider involuntary medication on competency grounds, did not moot Gutierrez's appeal. Id. at 905-08. Because the court remanded for additional administrative proceedings, the Court did not address Gutierrez's merits challenge to the district court's Sell determination.

Judge Davis dissented. He would have held that the new BOP regulations "would apply to Gutierrez on remand, rendering moot [Gutierrez's] request for a hearing under the prior version of the regulations." Id. at 909-12 (Davis, J., dissenting). He also would have held that even if the

1992 regulations were to apply to Gutierrez on remand, BOP should not be required to hold a hearing on competency. Judge Davis emphasized that Gutierrez did not challenge the district court's findings that there were no less intrusive alternatives treatment and that antispyschotic medication was medically appropriate and unlikely to result in side effects. Thus, Judge Davis concluded, a remand for a hearing on these issues would be "formalistic 'make work'" and would "accomplish nothing." Id. at 909, 913.

F. BOP Holds a Hearing and Approves Involuntary Medication of Gutierrez to Make Him Competent to Stand Trial

On October 19, 2011, Gutierrez was provided notice that an administrative BOP hearing would be held in two days to consider his involuntary treatment with psychotropic medication. SR2 66, 77. Ken Elsass, a registered nurse, was appointed to be Gutierrez's staff representative. SR2 67, 72, 78-79. Elsass spoke with Gutierrez and notified Gutierrez's counsel about the hearing. SR2 79. Gutierrez told Elsass that he had received orders to cut off the head of former President Bush and that he was going to "go on a mission to kill President Obama, Governor Rick Perry, Secret Service officers and his lawyers." Id.

Dr. Pyant and Dr. Williamson authored a report, dated October 19, 2011, addressed to the hearing officer. The report explained that Gutierrez was

not competent to stand trial due to a severe mental illness, namely schizophrenia. GRE 2 (Williamson-Pyant Report, October 19, 2011). With respect to involuntary administration of antipsychotic medication, the report concluded that no other less intrusive means are available to treat Gutierrez's mental illness and achieve competency restoration. Id.

Dr. Jean Zula, chief psychiatrist at FMC Butner, held a hearing on October 21, 2011. SR2 66-80. Dr. Zula interviewed Gutierrez and reviewed a host of materials. Among the materials she considered were the July 2010 and October 2011 reports from Dr. Pyant and Dr. Williamson, and records from Gutierrez's prior periods of hospitalization. SR2 68; see GRE 1-20 (July 2010 and October 2011 reports). Dr. Zula also considered "[p]otential alternatives to medication." SR2 69.

Dr. Zula "approved" Gutierrez's involuntary medication "as in [Gutierrez's] best medical interest." SR2 73, 76. In a written "justification" for her decision, Dr. Zula stated that "there is a substantial probability that treatment with antipsychotic medications can restore him to competency" to stand trial. SR2 73-75. Dr. Zula discussed Gutierrez's positive response to prior treatment and stated that "[t]reatment with either risperidone or olanzapine

would most probably be effective in this effort." SR2 75; see SR2 73-74.[3]

Gutierrez appealed Dr. Zula's decision. SR2 80. He argued that the "government is broken and corrupt" and that prison officials had "neglected [his] complaints about [his] mail and discrimination." Id. Gutierrez said to "contact the court" for more information, because "[a]s far as I know the court knows what they are doing and they shouldn't take so long to decide cases." Id. He also said he felt like he was "being used and strung along." Id.

The warden rejected Gutierrez's appeal. After reviewing Dr. Zula's report and the evidence presented at the hearing, the warden determined that "the hearing afforded [Gutierrez] the required due process under applicable regulations and controlling law, and that the decision of the hearing officer is supported by the record." SR2 65. The warden referred the matter to the district court for further proceedings, noting that under "controlling Supreme Court law" she was "not authorized to approve involuntary treatment with psychiatric medication for the sole purpose of restoring a person to competency

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[3]Gutierrez's counsel submitted a list of questions he wanted the hearing officer to answer. Defense counsel asked Dr. Zula to address, for example, whether it is "medically ethical, and if so medically appropriate, to medicate a patient against his will where the primary purpose of doing so is to restore the patient's competency to stand trial in a criminal case, not treatment of the illness." SR2 98-101. Dr. Zula declined to address questions that were outside the scope of the hearing. SR2 75.

to stand trial." SR2 64-65.

G. The District Court Holds a Second Sell Hearing

The district court held a Sell hearing on January 4, 2012.[4] The government introduced testimony from Dr. Zula. SR2 230-65. Gutierrez introduced expert testimony from psychiatrist Robert Cantu, M.D. SR2 265-80.

Dr. Zula testified that it would be "medically appropriate" to treat Gutierrez with antipsychotic medication, in particular risperidone or olanzapine. SR2 235, 238, 240-41. She said that treatment with antipsychotic medication is the "standard treatment for individuals with [Gutierrez's] diagnosis," SR2 235, and is "substantially likely to make him competent to stand trial," SR2 236, 240. Dr. Zula also opined that antipsychotic medication is "the only thing that will" return Gutierrez to competency to stand trial. SR2 236-37. According to Dr. Zula, treatment with antipsychotic medication is "the only chance," the "only plausible way." SR2 237. Dr. Zula testified that less

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[4]Before the hearing, Gutierrez sent the district court a letter in which claimed to be "King Blessed the Executioner" and threatened to kill the district judge. SR2 301-03. In addition, at the hearing, Gutierrez told the district judge, "Your government is going to come up to me, and I'm going to do what I'm going to have to do because you know that it's a conspiracy coming from your president to y'all underneath corrupting the world. . . . Everybody else will get to be put to death, they will be executed." SR2 286.

intrusive means, namely "psychological talk therapies," are not likely to work. SR2 238.

Gutierrez's expert witness, Dr. Cantu, testified that in his opinion Gutierrez was insane at the time he threatened to kill the President and others. SR2 269-71; see also SR2 153-54 (Dr. Cantu's written opinion). Dr. Cantu further testified, consistent with Dr. Zula's testimony, that "the only way [Gutierrez] can become not psychotic is with antipsychotic medicine." SR2 277. According to Dr. Cantu, therapy is "not going to work," and there is "no other way." SR2 277-78; see also SR2 155 (written opinion of Dr. Cantu stating that "the only reasonable treatment [for Gutierrez] would be psychotropic, specifically antipsychotic, medication"). Dr. Cantu said that there is some risk of side effects with antipsychotic medication, but they are "not often significant, and they are most often treatable when they do arise." SR2 271, 278.

Dr. Cantu also praised the work done by BOP medical personnel. He said that they "did an amazingly thorough job." SR2 270. In Dr. Cantu's estimation, "the amount of work that they went through on the Sell factors with regard to potential harm and likelihood of restoring competency . . . was quite impressive." SR2 270-71.

H. The District Court Again Approves Involuntary Medication

The district court approved involuntary medication in an order dated January 9, 2012. SR2 190-212. As an initial matter, the court concluded that BOP adequately complied with the 1992 regulations. The court said that BOP arguably failed to comply with the requirement that Gutierrez's "treating/evaluating psychiatrist/clinician . . . be present at the hearing," because Dr. Pyant (a psychologist) was present at his hearing, and the regulations arguably require the presence of a treating psychiatrist. SR2 202. But the court concluded that a psychologist qualifies as a "clinician," and that in any case Gutierrez was not prejudiced by the presence of a psychologist instead of a psychiatrist. SR2 202. The court also concluded that BOP complied with the 1992 regulations in all other respects: Gutierrez received notice of the hearing; a staff representative was appointed to represent him; a non-treating psychiatrist (Dr. Zula) presided over the hearing; Dr. Zula approved Gutierrez's involuntary medication; Dr. Zula prepared a written report about her decision; and Gutierrez was given an opportunity to pursue an appeal. SR2 201-05.

On the merits, the Court concluded that involuntary medication is justified under the four Sell factors. With regard to the first Sell factor, the

Court concluded that important government interests "weigh heavily in favor of involuntary treatment." SR2 194. The allegations that Gutierrez made threats "against the President, former Presidents, their families, and federal law enforcement" were "not minor," the court determined, and showed the "importance of the government's interest in trying Gutierrez." SR2 194. The court rejected Gutierrez's argument that the government's interests were undermined because he was likely insane at the time of the offense. SR2 194-95. Gutierrez "bears the burden of proving" the insanity defense at trial, the court explained, and "cannot invoke it as a shield until he has done so." SR2 195.

The court also rejected Gutierrez's argument that alleged effects on his right to a fair trial weigh against involuntary medication. SR2 205-06, 208-09. It is "illogical" to argue that a jury will be more likely to accept his insanity defense if he is not returned to competency, the court determined, because Gutierrez cannot stand trial if he is not competent. SR2 206. Moreover, the court explained, a fact finder will have to determine "whether Gutierrez was insane at he time of his alleged offense, not whether he is insane at the time of trial," and there is "no reason" to believe that a fact finder will not be able to make that determination "based on the evidence presented regarding his

condition at the time, not based on his present demeanor." SR2 206. In sum, the court concluded, Gutierrez "can have a fair trial without making a spectacle of his condition." SR2 209.

The court also concluded that the remaining three Sell factors were satisfied: (1) The evidence established that it is substantially likely antipsychotic medication will restore Gutierrez to competency, the court determined, and that it is substantially unlikely he will suffer side effects that will interfere with his ability to assist counsel with his defense. SR2 195-96. (2) Government doctors and Gutierrez's medical expert agree, the court explained, that involuntary medication is necessary to restore Gutierrez to competency: there are no alternative, less intrusive treatments that could achieve substantially the same results. SR2 197-98. (3) Medical opinion is similarly unanimous that administration of antipsychotic medication is in Gutierrez's best medical interest in light of his medical condition. Treatment with these drugs is standard for individuals with Gutierrez's diagnosis, the court noted, and he has responded positively to such treatment in the past. SR2 198-99.

SUMMARY OF ARGUMENT

1. BOP complied with the 1992 regulations. Gutierrez received adequate notice that a hearing would be held to consider his involuntary

medication for competency restoration. He was apprised of his rights at the hearing and was appointed a staff representative. Dr. Zula, a psychiatrist who was not involved in Gutierrez's diagnosis or treatment, conducted the hearing. A treating clinician was present at the hearing. Dr. Zula approved involuntary medication to make Gutierrez competent to stand trial, determining that such treatment was in Gutierrez's best medical interest. Dr. Zula also prepared a written report regarding the decision, a copy of which was given to Gutierrez. Gutierrez pursued an appeal, which the warden of FMC Butner rejected.

In particular, Dr. Zula adequately complied with the requirement that she "determine whether treatment or psychotropic medication is necessary in order to attempt to make the inmate competent for trial." 28 C.F.R. § 549.43(a)(5) (2010). She determined that antipsychotic medication, and in particular risperidone or olanzapine, is likely to make Gutierrez competent to stand trial. And after considering potential alternatives to medication, she approved involuntary treatment with antipsychotic medication as in Gutierrez's best medical interest.

Assuming *arguendo* that Dr. Zula's written report fell short because it did not contain an explicit written finding that alternative, less intrusive treatments would not be effective, the error was harmless. The determination that

alternative treatments would not be effective was implicit in Dr. Zula's report, and Dr. Zula testified at the Sell hearing that in her opinion antipsychotic medication is the only treatment that would restore Gutierrez to competency. Dr. Zula's opinion is consistent with the conclusions of every other medical professional that has evaluated Gutierrez, including Gutierrez's own medical expert.

Gutierrez's claim that his administrative appellate rights were prejudiced does not hold up. He had sufficient notice that Dr. Zula concluded alternative treatments would not be effective. And in any event, Gutierrez has at no point disputed the medical conclusion that there are no potential alternative treatments. There is therefore no basis to conclude he would have raised a claim of other potential alternatives had Dr. Zula included an explicit written finding in her report.

2. The first Sell factor is satisfied. As an initial matter, Gutierrez erroneously claims that defects in the district court's analysis require reversal. He is wrong that the district court employed incorrect reasoning, but regardless, the first Sell factor is a legal determination that this Court reviews *de novo*. This Court can therefore affirm on any grounds.

Turning to the merits, important government interests justify Gutierrez's

involuntary medication. First, Gutierrez is charged with serious crimes. Threatening to kill the President of the United States, two former Presidents, and a Secret Service agent are serious offenses. That conclusion is further buttressed by the substantial sentence Gutierrez would face if convicted, whether measured by the statutory maximum penalty or the potential Guidelines sentence.

Second, special circumstances do not offset the government's interests in bringing Gutierrez to trial for these serious crimes:

(a) The possibility of civil commitment does not diminish the government's interests. The potential for civil commitment is uncertain. Under the current record, it is not clear that a district court would find by clear and convincing evidence that Gutierrez's release would pose a substantial risk of endangering others. In any event, even if civil commitment were likely, that factor would not extinguish the government's interest in prosecution.

(b) The amount of time Gutierrez has been confined on the present charges does not offset the government's interests. The government's interest is in bringing Gutierrez to trial, not in being ensured a conviction. Regardless, Gutierrez faces substantial additional time in prison if convicted. And there are additional benefits to a conviction – such as a term of supervised release –

wholly separate from any period of imprisonment.

(c) Alleged effects of involuntary medication on Gutierrez's ability to mount an insanity defense do not lessen the government's interests. There is no basis in the record to support Gutierrez's speculation that medication might lead to an incorrect evaluation of his mental state at the time of the offense. In addition, Gutierrez does not have a right to replicate at trial his mental state at the time of the offense. It is not an option in our justice system for Gutierrez to remain incompetent and go to trial so that his appearance will support an insanity defense.

(d) Finally, the government's interests are not offset by the potential that Gutierrez would be adjudicated not guilty by reason of insanity at any trial. The government's interest is in bringing Gutierrez to trial, where Gutierrez would bear the burden of establishing an insanity defense by clear and convincing evidence. And even assuming it is likely that a finder of fact would adjudicate Gutierrez not guilty by reason of insanity, the government has a substantial interest in pursuing that course. An insanity acquittal triggers the burden-shifting provisions of the Insanity Defense Reform Act of 1984. The presumption in favor of confinement triggered by an insanity acquittal is conducive to protecting the public safety, because it tends to ensure

commitment when the dangers posed by an acquittee's release are less than clear. Thus, particularly where the safety of the President and former Presidents are at issue, the government has a compelling interest in obtaining an adjudication of not guilty by reason of insanity.

ARGUMENT

I. BOP Adequately Complied with the 1992 Regulations

Gutierrez argues that BOP failed to comply with the 1992 regulations, in particular Section (a)(5) of the 1992 regulations. Br. 16-22. He asks this Court to remand to BOP once again for another hearing. Br. 22.

A. Standard of Review

When determining whether an agency has complied with its own regulations, this Court gives substantial deference to the agency's interpretation and application of those regulations. See Texas Coal. of Cities for Util. Servs. v. FCC, 324 F.3d 802, 811 (5th Cir. 2003); Wang v. Ashcroft, 260 F.3d 448, 451 (5th Cir. 2001); see also Auer v. Robbins, 519 U.S. 452, 461 (1997) (an agency's interpretation or application of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation") (internal quotations and citations omitted); St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs., 309 F.3d 680, 709 (10th Cir. 2002) (while it is "no doubt true" that "an

agency is obliged to follow its own rules," the court gives deference to "the agency's interpretation of the relevant regulations").

Morever, to obtain relief from an agency's violation of its own regulations, a claimant must show that he was prejudiced by the violation. See Hall v. Schweitzer, 660 F.2d 116, 119 (5th Cir. 1981); Seales v. Holder, 354 Fed. Appx. 875, 879 (5th Cir. 2009) (unpublished); see also Schaefer v. McHugh, 608 F.3d 851, 854 (D.C. Cir. 2010) ("A party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice."); Kohli v. Gonzales, 473 F.3d 1061, 1066-67 (9th Cir. 2007) ("When presented with allegations that an agency has violated its own regulation . . . the claimant must show he was prejudiced by the agency's mistake."). Harmless error review is also mandated by Fed. R. Crim. P. 52(a), which states that in criminal proceedings "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

B. Argument

1. The BOP Hearing Complied with the 1992 Regulations

The BOP hearing over which Dr. Zula presided complied with the 1992 regulations in 28 C.F.R. § 549.43 (2010):

- *Section (a)(1).* Gutierrez was given written notice of the hearing. See SR2 77 (notice of hearing).

- *Section (a)(2).* Gutierrez was informed of his rights at the hearing, including his right to present evidence and to have a staff representative. See SR2 77 (advisement of rights). When Gutierrez did not request a staff representative, he was appointed one. See SR2 66-67, 78-79.

- *Section (a)(3).* The hearing was conducted by Dr. Zula, a psychiatrist who was not involved in Gutierrez's diagnosis or treatment. See SR2 76, 232.

- *Section (a)(4).* A treating clinician, Dr. Pyant, was present at the hearing and provided relevant information to Dr. Zula. See SR2 68-69, 232.

- *Section (a)(5).* Dr. Zula approved involuntary medication to make Gutierrez competent to stand trial, determining that such treatment was in Gutierrez's best medical interest. Dr. Zula also prepared a written report regarding the decision. See SR2 73-76 (written report).

- *Section (a)(6).* Gutierrez was given a copy of the report and advised he could submit an appeal. See SR2 76. After Gutierrez submitted an appeal, see SR2 80, the warden made the determination that "the hearing afforded [Gutierrez] the required due process under applicable regulations and controlling law, and that the decision of the hearing officer is supported by the record," SR2 65.

Gutierrez nonetheless contends that the government "declined to follow the regulation applicable to forcible medication." Br. 16. Specifically, Gutierrez claims that Dr. Zula failed to comply with Section (a)(5) of the 1992 regulations, which states in relevant 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." 28 C.F.R. § 549.43(a)(5) (2010); see Br. 17-19.

Gutierrez is wrong. Dr. Zula "approved" involuntary treatment with antipsychotic medication to make Gutierrez competent to stand trial. SR2 73. Dr. Zula considered "[p]otential alternatives to medication," SR2 69, but concluded that medication was "in [Gutierrez's] best medical interest," SR2 73. Dr. Zula determined that "there is a substantial probability that treatment with antipsychotic medication will render [Gutierrez] competent to proceed to trial," and in light of his past treatment history concluded that "either risperidone or olanzapine would most probably be effective in this effort." SR2 75. Thus, Dr. Zula determined that antipsychotic medication is necessary in order to make Gutierrez competent for trial.

To be sure, Dr. Zula's written findings did not use the word "necessary" or mimic the language contained in the 1992 regulations, but the regulations do not require such formalism. As this Court has explained, under the 1992 regulations, a hearing officer is "tasked with determining whether medication for competency [is] medically proper." Gutierrez, 443 Fed. Appx. at 902. The hearing officer must make "medical findings," namely "whether medication [is] necessary and effective to render a defendant competent." Id. at 903. This

means that the government "must . . . produce[] evidence to satisfy a psychiatrist not involved in [the defendant's] treatment that medication [is] justified as a medical determination." Id. In other words, the hearing officer – a "neutral psychiatrist" – must find that "forced medication [is] medically justified." Id. at 906.

Dr. Zula did just that. After interviewing and observing Gutierrez and reviewing the reports of his treating clinicians, potential alternative treatments, and his past treatment history, Dr. Zula concluded that involuntary medication to make Gutierrez competent is in his "best medical interest." SR2 73. According to Dr. Zula, antipsychotic medication, and specifically risperidone or olanzapine, is substantially likely to make him competent to stand trial. SR2 75. Thus, Dr. Zula's approval of involuntary medication, and her accompanying written report, satisfied 28 C.F.R. § 549.43(a)(5) (2010). See SR2 66-76 (written report).

Gutierrez suggests that in order to comply with Section (a)(5) of the 1992 regulations Dr. Zula had to make explicit findings that (1) antipsychotic medication is likely to make him competent for trial, (2) such medication is medically appropriate, and (3) there are no alternative, less intrusive means of making him competent for trial. Br. 21-22. In other words, Gutierrez appears

to argue that the 1992 regulations required a BOP hearing officer to make three of the four findings that a district court must make under Sell before ordering involuntary medication for competency restoration.

This claim does not stand up to scrutiny.[5] The 1992 regulations were enacted 11 years before the Supreme Court decided Sell, and nothing in the 1992 regulations suggests that BOP anticipated the specific substantive standard later announced in Sell. Instead, the 1992 regulations contain the more general requirement that a hearing officer "determine" whether involuntary medication is "necessary in order to attempt to make the inmate competent for trial." 28 C.F.R. § 549.43(a)(5) (2010). While the regulations require the hearing officer to "prepare a written report regarding the decision," id., the regulations do not contain a requirement that the report contain any particular findings, let alone specific findings that would support an involuntary medication order under Sell.

In any event, even if the 1992 regulations required Dr. Zula to make the

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[5]Gutierrez's argument is also in tension with the position he took before this Court at oral argument in the previous appeal in this case, where defense counsel said that "the factors in Sell are different than the factors under the regulations," and that the question a BOP hearing officer must address is "whether the proposed treatment with involuntary medication is medically appropriate and correct." Oral Argument at 10:45, 13:05, 14:01, United States v. Gutierrez, 443 Fed. Appx. 898 (No. 11-50146), available at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx.

three-part determination suggested by Gutierrez, Dr. Zula satisfied that requirement. Dr. Zula plainly made written findings regarding efficacy and medical appropriateness: in her written "justification" for her approval of involuntary medication, Dr. Zula stated that "there is a substantial probability that treatment with antipsychotic medications will render [Gutierrez] competent to proceed to trial," and that in light of his past treatment history, "either risperidone or olanzapine would most probably be effective in this effort." SR2 75.

Dr. Zula also made a necessity determination. While Dr. Zula's written "justification" did not use the word "necessary" or explicitly state that less-intrusive means would not be effective, her report – considered in its totality – shows that she made that determination.[6] Most obviously, Dr. Zula stated that

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[6]Dr. Zula apparently did not use the word "necessary" because of how she uses the word in involuntary medication proceedings. In Sell, the Supreme Court held that before ordering involuntary medication a district court must find, *inter alia*, that involuntary medication is "necessary" to further important governmental interests. The Court explained that in this context "necessary" means that "any alternative, less intrusive treatments are unlikely to achieve substantially the same results." 539 U.S. at 181. But Dr. Zula, a medical doctor, uses the term "necessary" to mean "medically necessary," by which she means that an inmate's mental illness is "compromising his physical health" or making him "a danger to himself or others." ER 234. Thus, Dr. Zula apparently did not write in her report that medication was "necessary" because, as everyone agrees, Gutierrez is not gravely disabled or a danger to himself or others. Dr. Zula nonetheless made the determination that medication is necessary for purposes of Sell, *i.e.*, that no other alternative, less

she considered "[p]otential alternatives to medication." SR2 69. Her report also reflects that she considered the July 2010 and October 2011 reports from Dr. Williamson and Dr. Pyant, SR2 68-69, both of which concluded that alternative, less-intrusive treatments would not be effective with Gutierrez, see GRE 2, 15. In fact, the lack of effective alternatives to medication has been a prominent theme throughout this case. See, e.g., GRE 2, 33; Dkt. 35, at 10 (hearing transcript); R 62. Thus, as the district court correctly concluded, implicit in Dr. Zula's report is the determination that alternative treatments would not be effective. SR2 198.

If there was any ambiguity on that score, Dr. Zula eliminated it at the Sell hearing. During her testimony, Dr. Zula stated unequivocally that after interviewing Gutierrez, talking to him, observing him over time, and reading the reports, she concluded that involuntary medication is the "only plausible way" to restore Gutierrez to competency. SR2 237. According to Dr. Zula, "psychological talk therapies" would not be effective. SR2 238.

Finally, Gutierrez alleges that BOP legal staff and Department of Justice lawyers "instructed [Dr. Zula] not to make the finding required by" Section (a)(5) of the 1992 regulations and to "ignore [this Court's] commands." Br. 16-

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intrusive treatment would be effective.

17. These allegations, which Gutierrez apparently rests on Dr. Zula's testimony at the Sell hearing, are incorrect and unfounded.

Dr. Zula testified to her understanding, based on consultation with BOP legal staff, that under Sell an inmate can be forcibly medicated for competency restoration only after a district court has approved involuntary medication. SR2 234-35, 249-50. As she stated in her hearing report, "[s]econdary to the Supreme Court Sell decision, we are unable to treat Mr. Gutierrez involuntarily for the purpose of restoring him to competency to stand trial; that authority is restricted to the Court." SR2 167.[7] But although Dr. Zula did not order prison officials to actually administer medication to Gutierrez, she conducted the BOP hearing in manner intended to comply fully with the 1992 regulations. See SR2 248 (Dr. Zula's testimony that she met the criteria of the 1992 regulations); SR2 241 (Dr. Zula's testimony that she made findings regarding medical appropriateness and the necessity of involuntary

[7]This position is well founded. As the Ninth Circuit recently concluded, when involuntary medication is sought solely for trial competence purposes, "Sell clearly mandates that the district court, using a higher substantive standard, make the involuntary medication determination." United States v. Loughner, 672 F.3d 731, 754 (9th Cir. 2012). Thus, under Sell, even if BOP officials determine that involuntary medication is warranted to make an inmate competent for trial, it is unconstitutional to administer medication to the inmate until a federal district court considers the relevant factors and enters an order approving involuntary medication.

medication).

In sum, Dr. Zula did not understand herself to be unable to comply with the hearing procedures set forth in the 1992 regulations. As the district court correctly recognized, the only act Dr. Zula believed that she was unable to perform was to "actually order and carry out forced medication" on competency grounds. SR2 203. In other words, it was her (correct) understanding that Sell requires actual administration of medication to await an operative order from the district court. As the district court concluded, Gutierrez "can hardly complain about receiving an additional protection, one *not* required by the 1992 regulations; namely, the BOP's refusal to medicate him absent a court order pursuant to Sell." SR2 204-05 (emphasis in original).

2. Any Shortcomings in Compliance with the 1992 Regulations Was Harmless

Any failure to comply with the 1992 regulations was harmless. Specifically, even if Section (a)(5) of the 1992 regulations required Dr. Zula to include in her report an explicit written finding that less intrusive treatments would not be effective, Gutierrez was not prejudiced by the omission of such a written finding from Dr. Zula's report.

First, Dr. Zula made a determination that alternative treatments would not be effective – *i.e.*, that antipsychotic medication was "necessary," as the

term is used in Sell – even if she did not express this determination in an explicit written finding. Dr. Zula testified at the Sell hearing that after reviewing the relevant reports and examining Gutierrez, she determined that no other treatment would be effective in making him competent for trial. SR2 236-37, 238. This determination was implicit in her report, which stated that she considered alternative treatments. SR2 69. Thus, Gutierrez was "afforded a determination by a neutral psychiatrist," Gutierrez, 443 Fed. Appx. at 906, that alternative, less intrusive treatments would not make him competent for trial.

Second, medical opinion is unanimous that antipsychotic medication is the only treatment that will make Gutierrez competent for trial. Dr. Williamson and Dr. Pyant opined in their July 2010 report that involuntary medication is necessary because alternative, less-intrusive means would be unlikely to restore Gutierrez to competency. GRE 15. They reiterated that opinion in their October 2011 memo to Dr. Zula. GRE 2. Dr. Zula concluded that alternative, less intrusive treatments would not be effective. SR2 236-37, 238. And on top of that, Gutierrez's own expert witness unequivocally agrees that the only way to make Gutierriez competent is to treat him with antipsychotic medication. SR2 155, 277-78. Insofar as this Court has

concluded that a principal benefit of the 1992 regulations is that they require a psychiatrist not involved in the patient's treatment to provide a "neutral" medical assessment, see Gutierrez, 443 Fed. Appx. at 906, there have now been two non-treating physicians, Dr. Zula and Dr. Cantu, who agree that treatment with antipsychotic medication is the only way Gutierrez will become competent for trial. Gutierrez therefore was not prejudiced by the omission of a written finding from Dr. Zula's report that medication is "necessary." See Loughner, 672 F.3d at 754 (finding deficiencies in staff representative assigned to Loughner at BOP Harper hearing harmless because three hearings, including a federal judicial hearing, "all reached the same conclusion: Loughner is a danger and needs to be medicated").

Gutierrez contends that "[t]he failure to make the requisite necessity finding . . . undermined the efficacy of [his] administrative appeal." Br. 22. According to Gutierrez, "[w]ithout the finding, he could not appeal the crux of the case." Id. But Gutierrez had more than adequate notice that Dr. Zula determined that alternative treatments were not viable, and Gutierrez therefore had an adequate opportunity to raise that issue in his administrative appeal even absent an explicit written finding in Dr. Zula's report.

Moreover, there is no basis to conclude that Gutierrez would have

challenged Dr. Zula's necessity determination had she included an explicit finding in her written report. Throughout this case, Gutierrez has not challenged the determination that antipsychotic medication is the only treatment that would be effective. At the first Sell hearing, he offered no evidence to rebut the government's evidence on the Sell factors. Gutierrez, 443 Fed. Appx. at 900. On appeal from the district court's first Sell order, he did not challenge the determination that antipsychotic medication was medically appropriate and necessary. See id. at 913 (Davis, J., dissenting). And at the second Sell hearing, his own expert testified that antipsychotic medication is necessary. It defies common sense to contend that Gutierrez would have raised a claim in his administrative appeal that he as repeatedly and consistently disclaimed and forgone. Gutierrez's argument that his administrative appeal rights were compromised is meritless.

II. Important Government Interests Justify Gutierrez's Involuntary Medication

Gutierrez argues that the government has failed to show that it has sufficiently important interests to justify his involuntary medication. Br. 23-37. In other words, he contends that the district court erroneously found that the first Sell factor was satisfied.

A. Standard of Review

Whether governmental interests are sufficiently important to justify involuntary medication, the first Sell factor, "is a legal issue subject to *de novo* review." Palmer, 507 F.3d at 303.

Gutierrez agrees that the first Sell factor is a legal issue and that this Court reviews legal conclusions *de novo*. Br. 23. He nonetheless contends that the district court had to find the first Sell factor by clear and convincing evidence. Br. 24. That is incorrect. The courts of appeals have "uniformly concluded that in Sell cases the government bears the burden of proof on *factual* questions by clear and convincing evidence." United States v. Diaz, 630 F.3d 1314, 1331 (11th Cir. 2011) (emphasis added). That is because the clear and convincing evidence standard is an intermediate standard of proof that lies "between a preponderance of the evidence and proof beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 425 (1979). The clear and convincing evidence standard therefore applies only to the final three Sell factors. See, e.g., United States v. Fazio, 599 F.3d 835, 840 n.2 (8th Cir. 2010). ("We agree with our sister circuits that the government bears the burden of proving the final three Sell factors by clear and convincing evidence.").

B. Argument

The government has interests sufficient to justify involuntary medication if a defendant is charged with a "serious crime" and "[s]pecial circumstances" do not offset the government's interests in trying the defendant for that crime. Sell, 539 U.S. at 180. Gutierrez does not dispute that he has been charged with serious crimes. Instead, he argues that special circumstances undermine the government's interests in trying him for those serious crimes. Br. 27-37. He also contends that the district court erroneously analyzed whether important government interests justify his involuntary medication, and that this purported error requires reversal. Br. 24-27.

1. The District Court Did Not Employ an Incorrect Analysis, And Any Such Error Would Not Require Reversal

Gutierrez contends that the district court only assessed whether he was charged with serious crimes and did not determine whether "special circumstances" sufficiently offset the seriousness of his crimes. Br. 26. He is wrong. The district court considered and rejected Gutierrez's claim – which he renews in this Court, see infra pp. 57-61 – that the government does not a have an important interest in bringing him to trial because he was insane at the time of the offense. See SR2 194-95. The court also addressed and rejected Gutierrez's claim – again, one he renews in this Court, see infra pp. 55-57 –

that alleged effects on his fair trial rights weigh against involuntary medication. SR2 205-06, 208-09. The district court did not label these "special circumstances," but the court employed the correct method of analysis.

In any event, any error in the district court's method of analysis would not support reversal. When this Court applies *de novo* review to a legal issue, it can affirm on any grounds, regardless of the reasoning employed by the district court. See, e.g., United States v. Dunigan, 555 F.3d 501, 508 n.12 (5th Cir. 2009); Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 486 (5th Cir. 2002). Regardless of the district court's analysis, this Court ultimately must consider anew whether the government has important interests warranting Gutierrez's involuntary medication.

Gutierrez suggests that a court's error in analyzing the first Sell factor necessarily infects the court's assessment of the remaining Sell factors. See Br. 26-27. But the factual issues presented in the last three Sell factors – whether medication is substantially likely to render the defendant competent to stand trial, whether less intrusive treatments are unlikely to achieve substantially the same results, and whether administration of the drugs is medically appropriate – are wholly separate from the purely legal determination whether "important governmental interests are at stake." Sell, 539 U.S. at 180.

2. There Are Important Government Interests in Bringing Gutierrez to Trial for Serious Crimes

The "nature [and] effect" of the conduct underlying the charges against Gutierrez establish that he has been charged with serious crimes. United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007). Gutierrez threatened to kill the President of the United States, two former Presidents, and a law enforcement officer charged with protecting those public officials. See United States v. Nicklas, 623 F.3d 1175, 1178, 1180 (8th Cir. 2010) (transmitting threats to murder an FBI agent a serious crime); United States v. Bush, 585 F.3d 806, 814-15 (4th Cir. 2009) (threatening a judge a serious crime); United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005) (threatening to kill a judge); cf. Palmer, 507 F.3d at 304 (finding it pertinent that defendant threatened the life of a federal officer); see generally United States v. Grape, 549 F.3d 591, 602 (3d Cir. 2008) (severity of the offense affects weight afforded governmental interests). The government has a substantial interest in trying individuals who threaten to kill public officials, particularly past and present Presidents of the United States.

The charges against Gutierrez are also serious when measured by the maximum penalty. As this Court noted in Palmer, crimes authorizing a punishment of over six months are generally "serious." 304 F.3d at 304. The

statutory maximum sentence for two of the charges against Gutierrez is five years of imprisonment, see 18 U.S.C. §§ 871(a) & 879(a), and the third charge carries a statutory maximum of ten years, see 18 U.S.C. § 115(b)(4). Gutierrez therefore faces up to twenty years in prison if convicted.

While courts have generally concluded that "it is appropriate to consider the maximum penalty, rather than the sentencing guidelines range, in determining 'seriousness' in involuntary medication proceedings," Palmer, 507 F.3d at 304, the charges against Gutierrez must be deemed serious even if gauged by the Sentencing Guidelines. See Nicklas, 623 F.3d at 1179 n.5 (while the projected Guidelines range is relevant, greater weight should be placed on the statutory maximum); United States v. Green, 532 F.3d 538, 549-50 (6th Cir. 2008) (statutory maximum and not Sentencing Guidelines should be used to determine whether a crime is serious); Evans, 404 F.3d at 237-38 (focus should be on the statutory maximum authorized by statute); but see United States v. Hernandez-Vasquez, 513 F.3d 908, 919 (9th Cir. 2008) (concluding that "the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness"). Although there is currently insufficient information to assess Gutierrez's probable advisory Guidelines range if convicted, available information suggests that a Guidelines range close to the 20-year statutory

maximum is possible.[8] Moreover, the commentary to the relevant offense guideline, Guidelines § 2A6.1, instructs that departures in cases involving threats may be warranted because threatening communications can encompass a wide range of conduct. See U.S.S.G. § 2A6.1 cmt. 4. Thus, just as this Court concluded in Palmer that threatening the life of a federal officer and causing substantial disruption might lead a sentencing court to upwardly depart from

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[8]Gutierrez contends that the "likely advisory guideline range for his offense would be 15 to 21 months imprisonment." Br. 30 & n.14; see SR2 92 n.7. That is not correct. The base offense level for each of the three counts would be 12, see U.S.S.G. § 2A6.1(a)(1), and a 2-level enhancement would apply because the offenses "involved more than two threats," U.S.S.G. § 2A6.1(b)(1). Under Guidelines § 3A1.2, the offense level would be increased by 3 levels because the threats were motivated by the victims' status as past or present government officers, see U.S.S.G. § 3A1.2(a), and another 6 levels because the applicable offense guideline (Guidelines § 2A6.1) is "from Chapter Two, Part A," U.S.S.G. § 3A1.2(b). In addition, each of the three counts involved threats to different individuals, and under Guidelines § 2A6.1 "[m]ultiple counts involving different victims are not to be grouped under § 3D1.2." U.S.S.G. § 2A6.1 cmt. 3. Thus, under Guidelines § 3D1.4, the combined offense level would be 3-levels above the offense level for the count carrying the highest offense level. The total offense level applicable to Gutierrez would therefore be at least 26. Morever, under the current record, it is not clear whether Gutierrez would receive a 6-level enhancement for "conduct evidencing an intent to carry out such threat," U.S.S.G. § 2A6.1(b)(2), or a 4-level enhancement for "substantial disruption of . . . governmental . . . functions" or "a substantial expenditure of funds to . . . respond to the offense," U.S.S.G. § 2A6.1(b)(4). His total offense level could therefore be as high as 36. Assuming Gutierrez is correct that he falls within Criminal History Category III, see SR2 92 n.7, he could face an advisory Guidelines range of 235 to 293 months of imprisonment.

the advisory Guidelines range, 507 F.3d at 304, the identities of Gutierrez's victims, the number of threats, and Gutierrez's prior similar conduct all suggest that a sentencing judge might depart or vary upward in this case. The charged offenses here are serious.

Finally, in addition to the seriousness of Gutierrez's offenses, other factors further buttress the government's interest in prosecuting Gutierrez. The government has a compelling interest, for instance, in sending a message to the public that it takes seriously threats to public officials, and that such threats will carry consequences. See Bush, 585 F.3d at 815. And Gutierrez has engaged in similar conduct in the past, a factor that courts have found strengthens the government's interest in bringing a defendant to trial. See Nicklas, 623 F.3d at 1180; Grape, 549 F.3d at 602.

3. Special Circumstances Do Not Lessen the Government's Interests

Gutierrez identifies four alleged "special circumstances" that he argues offset the importance of the government's interests in bringing him to trial. Gutierrez's arguments do not withstand scrutiny.

1. Gutierrez argues that the potential for civil commitment mitigates the government's interests in bringing him to trial. Br. 28-30. According to Gutierrez, there is a "strong likelihood that [he] will continue to be

institutionalized," and this likelihood "dilutes" the government's interests in prosecuting him. Br. 29-30.

On the basis of the current record, however, the potential for civil commitment is uncertain. The evidence that Gutierrez currently believes he will receive directions from God to inflict harm on others might support a finding by clear and convincing evidence that Gutierrez would be a danger to others if released. See 18 U.S.C. § 4246(d) (court may order civil commitment only if it finds by clear and convincing evidence that individual's release would "create a substantial risk" of injury to others or damage to property of another).[9] On the other hand, prison officials have concluded that Gutierrez is not a danger to himself or others in the prison hospital setting, see SR2 264-65, and Gutierrez apparently has been released from civil confinement in the past, see SR2 74-75, 260-61. See also Palmer, 507 F.3d at 304 (noting that defendant was previously found not to be a candidate for civil commitment, and therefore

[9]Gutierrez's expert, Dr. Cantu, testified that "just having psychosis isn't a predictor of dangerousness, but when you add thought-control issues, again, you know, that you believe the government's controlling your mind, you know, that adds to it." SR 278. And while Gutierrez has not "done anything physical" after his release from hospitalization in the past, "neither have a lot of people before they do something serious." SR 278.

a similar outcome was possible if he was evaluated again).[10] These countervailing considerations suggest that there is a real possibility that Gutierrez will be released if he is not prosecuted. As a result, the potential for civil commitment does not substantially lessen the government's interest in prosecution. See Grape, 549 F.3d at 601-02 (where it was "impossible for [the court] to predict how likely it is that" defendant will be subject to civil confinement, the potential for civil commitment does not lessen the government's interest in proceeding to trial); United States v. Gomes, 387 F.3d 157, 161 (2d Cir. 2004) (because the prospect of civil commitment was unlikely, it did not undermine the government's interest in bringing defendant to trial); United States v. Ruiz-Gaxiola, 623 F.3d 684, 694 (9th Cir. 2010) (the "slim possibility of [defendant's] future civil commitment" did not lessen the government's interest in prosecution); United States v. Bradley, 417 F.3d 1107, 1116-17 (10th Cir. 2005) (where there was a lack of record support for proposition that the defendant would be a candidate for civil commitment, the potential for civil commitment did not lessen the government's interest in prosecution).

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[10]Dr. Cantu testified that the bar for commitment is "high," "at least in Austin." SR 277. According to Dr. Cantu, "unless you get caught with a bomb or have a gun, it's not going to happen." SR 277.

In any case, civil commitment is not a substitute for a criminal trial. Sell, 539 U.S. at 180. Thus, the "potential for future confinement," even if it is likely, does not "totally undermine" the government's interest in prosecution. Id.

2. Gutierrez argues that the length of time he has been in custody on the present criminal charges (31 months at the time he filed his opening brief in this appeal) lessens the government's interest in prosecuting him. Br. 30-31. As explained in Sell, the government's interest in prosecution may be lessened when "the defendant has already been confined for a significant amount of time . . . for which he would receive credit toward any sentence ultimately imposed." 529 U.S. at 180. According to Gutierrez, he has been detained for a period that exceeds the likely Guidelines range that would apply if he were convicted, and this "weighs against forcibly medicating him now." Br. 30.

As an initial matter, it is appropriate to consider Gutierrez's 31-month confinement against the applicable 20-year statutory maximum that he faces. In Evans, for instance, the Fourth Circuit concluded that the defendant's 2-year confinement for psychiatric evaluation did not lessen the government's interests when the defendant faced a 10-year statutory maximum and therefore could be imprisoned an additional 8 years. 404 F.3d at 239. But even if

Gutierrez's length of confinement is considered against a potential Guidelines range, his argument fails. If convicted, Gutierrez's Guidelines range will be substantially higher than 31 months; on the basis of the current record, it appears he will face a range of at least 78 to 97 months of imprisonment, and possibly a range as high as 235 to 293 months of imprisonment. See supra p. 48 n.8. The claim that Gutierrez's 31-month confinement lessens the government's interests therefore lacks merit. See, e.g., Valenzuela-Puentes, 479 F.3d at 1226, 1227 (government's interest not lessened where defendant confined for 4 years but faces 20-year statutory maximum and a likely guideline range of 77 to 96 months); Ruiz-Gaxiola, 623 F.3d at 695 (government's interest not lessened where defendant confined 47 months and faces likely Guidelines range of 100 to 125 months).

Moreover, even if Gutierrez would not serve any additional time in prison if convicted, that alone does not defeat the government's interests in obtaining a conviction. See Sell, 539 U.S. at 186. As this Court noted in Palmer, the government's interest is not necessarily in having Gutierrez serve time in prison, "but rather in ensuring that he is brought to trial." 507 F.3d at 304-05. And there are benefits to bringing Gutierrez to trial wholly apart from any amount of time he might be incarcerated. See Bush, 585 F.3d at 815. A

conviction, for instance, would likely subject Gutierrez to a period of supervised release, during which the government would be able to monitor him to ensure that he takes his medications and maintains a stable, non-violent lifestyle. See Bush, 585 F.3d at 815; Grape, 549 F.3d at 602; Nicklas, 623 F.3d at 1179; see also United States v. Holman, 532 F.3d 284, 285 (4th Cir. 2008) (upholding a special condition of supervised release that defendant "participate in mental health treatment and take all prescribed medication, including intramuscular injections of an antipsychotic drug"). A conviction could also "create certain limitations on [Gutierrez's] subsequent activities, such as [his] ability to obtain and own firearms," which "may be particularly important where, as here, [Gutierrez] is charged with making threats against" federal officials. Bush, 585 F.3d at 815. In addition, prosecution of Gutierrez signals the importance the government places on punishing threats against government officials, and it emphasizes the likely consequences of such conduct. Id. These potential benefits justify pursuing a prosecution even if Gutierrez would not serve any additional period of confinement.[11]

[11]Gutierrez also contends that "[t]he Government, through its own behavior, has dragged this prosecution out to the point where its dilatoriness now must count against it." Br. 31. The claim that the government has been dilatory is unfounded. The record demonstrates that the government has consistently prosecuted this case in a timely manner.

3. Gutierrez argues that his involuntary medication will prevent him from receiving a fair trial. Br. 32. According to Gutierrez, treating the symptoms of his mental illness – e.g., paranoid delusions and hallucinations – may unfairly undermine his insanity defense. Id.

Gutierrez first suggests that treatment of his illness may affect an assessment of his mental state at the time of the offense. He appears to argue that medication might skew an evaluation and lead to an incorrect conclusion that he was sane when he committed the offenses. Gutierrez provides no support for this assertion, however, and in fact the relevant record evidence is to the contrary. Government doctors who evaluated Gutierrez have opined that they would be able to offer a better assessment of Gutierrez's mental state at the time of the offense if he were competent. SR2 238-39, 252; Dkt. 17, at 6-9, 12; Dkt. 35, at 16. And the testimony of Gutierrez's medical expert, Dr. Cantu, supports this position. Dr. Cantu testified that if Gutierrez were to become competent, he might be able to offer insight into his mental state at the time he made the threats. SR2 274. Gutierrez "might be able to look back and say, that was amazing or crazy what I was doing and thinking and saying." SR2 274. Thus, there is no basis to conclude that involuntary medication would lead to a defective insanity evaluation.

Gutierrez also argues that treatment of his illness would undermine his fair trial rights because "it may affect his appearance, his manner, his demeanor, and the substance of any testimony he may give." Br. 32. Gutierrez apparently argues that a fact finder might be less likely to find him not guilty by reason of insanity if he is not mentally ill at the time of the trial. Of course, "[a] criminal defendant may not be tried unless he is competent." Godinez v. Moran, 509 U.S. 389, 396 (1993). And nothing in Sell suggests that Gutierrez has a protected interest in proceeding to trial in his incompetent state in order to gain a verdict that he is not responsible by reason of mental disorder. That course is "not an option in our system." United States v. Gomes, 387 F.3d at 162; see United States v. Weston, 255 F.3d 873, 884 (D.C. Cir. 2001) (rejecting defendant's argument that medication would prevent him from mounting an insanity defense); see also SR 206 (district court concluding that Gutierrez's argument is "illogical").

Moreover, "a defendant does not have an absolute right to replicate on the witness stand his mental state at the time of the crime." Weston, 255 F.3d at 884. Just as a defendant asserting a heat-of-passion or voluntary intoxication defense would have no right to replicate those states of mind while testifying at trial, a defendant claiming insanity has no basis to complain about

medication-induced competence to stand trial. Id. As the district court recognized, there is ample evidence that is probative of Gutierrez's mental state at the time of the offense, and Gutierrez will have the opportunity to present that evidence at trial, where the trier of fact can be expected to render a decision on the basis of that evidence, rather than on Gutierrez's demeanor at the time of trial. SR2 206; see Weston, 255 F.3d at 884-85.

4. Gutierrez contends that the government does not have an interest in bringing him to trial "because all of the available evidence suggests that [he] was insane at the time of the alleged offenses, and is insane now." Br. 32-37. According to Gutierrez, when "a person is unable to comprehend his actions or the trial and is overwhelmingly likely to be found not guilty by reason of insanity, there is no significant government interest." Br. 34; see SR2 228-29.

Gutierrez is wrong. The government's important interest is in bringing him to trial, not in being guaranteed to secure a conviction. Palmer, 507 F.3d at 304. At trial, Gutierrez can pursue any defense available to him. Insanity is an affirmative defense that must be raised at trial, where the defendant bears the burden of proving by clear and convincing evidence that at the time of the offense he did not appreciate the nature and quality of the wrongfulness of his acts. 18 U.S.C. § 17; see Shannon, 512 U.S. at 577; United States v. Eff, 524

F.3d 712, 715 (5th Cir. 2008). The purpose of pursuing a trial against Gutierrez is to permit a jury or a judge to determine these matters.[12]

Moreover, even if an adjudication of not guilty by reason of insanity is a likely outcome, the government nonetheless has a substantial interest in prosecuting Gutierrez. Under the Insanity Defense Reform Act, after an adjudication of not guilty by reason of insanity, the defendant is automatically "committed to a suitable facility until such time as he is eligible for release." 18 U.S.C. § 4243(a). The defendant is eligible for release only if he can establish that "his release would not create a substantial risk of bodily injury to another person or serious damage of property of another." 18 U.S.C. § 4243(d); see 18 U.S.C. § 4243(f) (same standard applies to discharge after initial commitment). For certain offenses, including offenses involving a substantial risk of bodily injury to another, the defendant bears the burden of proof by "clear and convincing evidence." 18 U.S.C. § 4243(d). For all other offenses, the burden is by "a preponderance of the evidence." Id.

Gutierrez argues that the government should be required to first explore

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[12]If, after further development of the record, the government ultimately determines that evidence establishes that Gutierrez was insane at the time of the alleged offenses, the government and Gutierrez together can ensure that this case is resolved properly, by for example agreeing to stipulated facts at a nonjury trial. See, e.g., United States v. Weed, 389 F.3d 1060, 1063 (10th Cir. 2004); United States v. Murdoch, 98 F.3d 472, 474 (9th Cir. 1996).

civil commitment before pursuing a criminal prosecution where acquittal by reason of insanity is likely. Br. 36-37; see also SR2 281. But the compelling nature of the government's interest in proceeding to trial against Gutierrez is not weakened simply because the government could pursue civil-commitment procedures without first obtaining a verdict of not guilty by reason of insanity. Whereas an insanity acquittee bears the burden of proving that he does not pose a danger, see 18 U.S.C. § 4243(d), in a civil-commitment proceeding, the government bears the burden of establishing by clear and convincing evidence that the individual poses a sufficient danger to himself or others to warrant his involuntary commitment, see 18 U.S.C. § 4246(d). See also Jones v. United States, 463 U.S. 354, 367 (1983) (noting the "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof"); Addington v. Texas, 441 U.S. at 425-33.

On the present record, the different burdens could well be outcome determinative. As noted, Gutierrez has been released in the past after civil commitment, and BOP officials have determined he is not a danger to himself or others in the prison setting. See supra pp. 50-51. In addition, according to Gutierrez's expert, Dr. Cantu, an individual is not dangerous to others simply

because he suffers from psychosis. SR2 278. Yet there is plainly a risk that Gutierrez could harm others. He has repeatedly stated that he is waiting for a directive from God to kill others, including law enforcement agents and past and present Presidents. According to Dr. Cantu, "thought-control issues" add to the risk of dangerousness. SR2 278. And while Gutierrez has not "done anything physical" after his release from hospitalization in the past, "neither have a lot of people before they do something serious." SR2 278. Under these circumstances, the evidence may be insufficient to establish by clear and convincing evidence that Gutierrez's release *would* present a substantial risk to others, while also being insufficient for Gutierrez to prove – either by a preponderance or clear and convincing evidence – that his release *would not* create a substantial risk to others.

In sum, if there is uncertainty about the risk of releasing Gutierrez into the public, he is more likely to be committed under the standards that apply to insanity acquittees. Under those standards, any doubt whether an individual will be dangerous to others if released will tend to be resolved in favor of commitment. Shifting the burden onto an insanity acquittee is therefore conducive to protecting the safety of the public. The government of course has a strong interest, and indeed an obligation, to protect the public safety. That

obligation is especially acute when the safety of those at issue includes the President and two former Presidents of the United States, two of whom live within relatively close proximity to Gutierrez. Thus, the possibility of an acquittal by reason of insanity, even if highly probable, does not diminish the government's interests in prosecution.

CONCLUSION

For the foregoing reasons, the district court's involuntary medication order should be affirmed.

Respectfully submitted,

JOHN MURPHY
Attorney for the United States,
Acting Under Authority Conferred
By 28 U.S.C. § 515

DOUGLAS W. GARDNER
Assistant United States Attorney
Western District of Texas

LANNY A. BREUER
Assistant Attorney General

JOHN D. BURETTA
Acting Deputy Assistant Attorney General

/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W.
Rm. 1264
Washington, D.C. 20530
(202) 307-3766
john.pellettieri@usdoj.gov

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/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W., Rm. 1264
Washington, D.C. 20530
(202) 307-3766
john.pellettieri@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I further certify that appellant's counsel, Philip J. Lynch, is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W., Rm. 1264
Washington, D.C. 20530
(202) 307-3766
john.pellettieri@usdoj.gov