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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The district court ordered that Jesse Gutierrez be involuntarily medicated in an effort to render him competent to stand trial on charges that he had made threats. Gutierrez argues on appeal that the Government failed to follow the applicable regulation that this Court ordered it to follow. He also argues that the forcible-medication order was improper because the Government's interest in prosecuting him is not sufficient to overcome his liberty interest in avoiding forced medication.

The Government contends that it complied with the regulation, at least substantially, and that any noncompliance was harmless. The Government also argues that the circumstances of this case show a sufficiently strong interest in prosecuting Gutierrez to warrant an order of involuntary medication. Gutierrez replies to explain why the Government failed to comply with the regulation, and why, in the circumstances of his case, involuntary medication is not warranted under the test set out by the Supreme Court in *Sell v. United States*, 539 U.S. 166 (2003).[1]

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1. Gutierrez does not intend to waive any issue by not responding to contentions addressed in his opening brief.

ARGUMENTS AND AUTHORITIES

I. THE GOVERNMENT DID NOT COMPLY WITH THE REGULATION. (Responsive to Government's Brief 30–39.)

The Court remanded this case for an administrative hearing in accordance with 28 C.F.R. § 549.43 (1992). *United States v. Gutierrez*, 2011 WL 4807760 (5th Cir. 2011). Section 549.43 governs "[i]nvoluntary psychiatric treatment and medication" for persons in Bureau of Prisons custody. The language of the regulation is "straightforward." *Gutierrez*, 2011 WL 4807760, at *3. It provides that the neutral psychiatrist conducting the administrative hearing "shall determine" whether the involuntary administration of psychotropic medicine "is necessary in order to attempt to make the inmate competent for trial[.]" 28 C.F.R. § 549.43(5).

Gutierrez argues that the Government failed to comply with the regulation on remand. Gutierrez Br. 16–22. The Government asserts that it did comply. The record shows otherwise. Dr. Jean Zula, who conducted the hearing, made it clear that she had not made the required finding. (2 S.R. 242, 247, 255–56); Gutierrez Br. 16–22.

At the *Sell* hearing, Dr. Zula confirmed specifically that she "didn't make" the determination, required by § 549.43(a)(5), "that medication was necessary for the reason for which it was being sought." (2 S.R. 256.) This

though the Court had remanded the case for precisely such a finding. In its prior opinion, the Court stated that, under the "straightforward" processes laid out in regulation, before forcibly medicating an inmate, the hearing officer "must have made a determination that medication was necessary for the reason for which it is being sought." *Gutierrez*, 2011 WL 4807760, at *3 (citing § 549.43(a)(5)). Dr. Zula did not make the required determination.

Instead, 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.) This was so, she said, 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.) Dr. Zula explained that she declined to make the finding required by the regulation because the BOP's legal staff did not believe she had to follow the regulation, even in the light of this Court's opinion. (2 S.R. 246–49.)[2]

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2. The Government contends that the assertion that the lawyers did so is unfounded. Gov't Br. 37–38. Dr. Zula's testimony was that BOP lawyers did so. (2 S.R. 246–49.) The district court accepted that testimony and stated that "Department of Justice" lawyers had told Dr. Zula that she could not make the required finding. (R. 203; 2 S.R. 246–49.) The district court presumably said Department of Justice lawyers because the BOP falls under the Justice Department. There is no suggestion by Gutierrez that the Justice Department lawyers involved

(continued…)

Dr. Zula opined that, because of the *Sell* decision, she did not have the authority to say that Gutierrez should be involuntarily medicated. (2 S.R. 242.) That was incorrect. Under the 1992 regulation, which governed involuntary medication in the Bureau of Prisons—and continues to govern Gutierrez's case as this Court held in the prior opinion—Dr. Zula not only had the authority to make the finding, she was required to comply with the regulation and make a finding, either for or against the medical necessity of forced medication to comply with the regulation and this Court's direction. And, the finding was required to accord Gutierrez due process under the regulation. The regulation and its required finding are part of the hierarchically ordered system that existed under the 1992 regulation and *Sell*.

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2. (…continued)
in the litigation in the courts so counseled Dr. Zula. Whatever the advice of the BOP lawyers, the important fact is that the required finding that involuntary medicine was medically necessary for the purpose of restoring competency for trial was not made.

The Government also asserts that Gutierrez's argument is "in tension with" his position at oral argument in the prior appeal. Gov't Br. 35 n.5. This is not so. In both appeals, the question is whether the regulation was complied with. In both cases, the argument is within the context of the wording of the regulation. The regulation requires a finding of medical necessity for the purpose of restoring competency for trial. While less intrusive means may show a lack of medical necessity, as Gutierrez contends, Br. 21–22, the important point is that Dr. Zula acknowledged that she did not make a finding that involuntary medication was necessary for the purpose for which it was sought—that is, for restoring competency for trial. (2 S.R. 234–35, 256.)

Sell did not displace the regulation or change the obligations of the BOP under it. In its prior opinion, this Court made clear that the BOP had to follow the regulation and make the required finding. *Gutierrez*, 2011 WL 4807760, at *3–*6, *9 (citing *Sell*, 539 U.S. at 171). That ruling settled the issue.

The Government argues that it did comply with the regulation, but Dr. Zula's testimony shows that it did not. She did not making a finding that involuntary medication was medically necessary to restore Gutierrez to competency for trial. (2 S.R. 234–35, 256.) Her report indicated that the medicine would likely make him competent, but not that it was medically necessary to administer drugs to make him competent for trial. (Zula Report.) She did check a box indicating that treating Gutierrez with involuntary medication would be "in the patient's best interest." (Zula Report at 8.) There is a difference between medically necessary and "in the patient's best interest." The former requires an objective finding that a course must be pursued to achieve a specific objective. The latter is a subjective judgment that a course would be beneficial. Before the process of overriding an accused's liberty interest in being free from forcible medication may be begun, the judgment required by the regulation must be made. This Court made that clear. *Gutierrez*, 2011 WL 4807760, at *3–*6. Dr. Zula made it

as clear that she had declined to make that particular finding. (2 S.R. 234–35, 256.)

The Government also argues that the required finding on the necessity of medication was "implicit" in Dr. Zula's written report. Gov't Br. 37.[3] It points out that Dr. Zula's report indicated that she had considered "potential alternatives to medication," as well as "the July 2010 and October 2011 reports from Dr. Williamson and Dr. Pyant," both of which concluded that alternative, less-intrusive treatments would not be effective. Gov't Br. 36–37.[4] At the *Sell* hearing, Dr. Zula did not say—and the district court did not find—that the required finding on the necessity of medication was "implicit" in the report. Dr. Zula explicitly stated that she had not made the finding. In light of this explicit statement, it cannot be that Dr. Zula implicitly made the finding required by § 549.43(a)(5).

The BOP failed to comply with the regulation. That noncompliance means that the *Sell* hearing held by the district court was, again, premature.

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3. The Government did not make an implicit-finding argument in the district court.

4. Dr. Zula also stated that she did not incorporate by reference any of these earlier medical reports as findings. (2 S.R. 250–51.)

II. THE FAILURE TO COMPLY REQUIRES VACATION OF THE ORDER AND REMAND. (Responsive to Government Brief 30–31, 39–42.)

The failure of the BOP to follow the regulation and this Court's clear direction require vacation of the involuntary-medication order. The Government suggests that "substantial deference" should be given to the BOP's "interpretation and application of the regulation" in Gutierrez's case, as it would in a case where a petitioner has challenged an agency's construction of a regulation under the Administrative Procedure Act (APA). Gov't Br. 30 (citing, *inter alia, Texas Coal of Cities for Util. Servs v. FCC*, 324 F.3d 802, 811 (5th Cir. 2003)). This is incorrect. This is not an APA case. More important, this Court explained that § 549.43 protects due process rights and must be followed to secure those rights. *Gutierrez*, 2011 WL 4807760, at *3; *see generally* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 607–11 (June 2006) (Due Process Clause is a basis for seeking judicial enforcement of agency regulation). And, of course, this Court remanded for application of the regulation's straightforward

language.[5] That application did not occur. No invocation of the APA and its substantial-deference standard can change that fact.

It is an "unremarkable proposition that an agency must abide by its own regulations." *Chevron Oil Co. v. Andrus*, 588 F.3d 1383, 1386 (5th Cir. 1979) (citing *Service v. Dulles*, 354 U.S. 363, 372 (1957)); *see also Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007) (same). "'When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed.'" *Alamo Express, Inc. v. United States*, 613 F.2d 96, 98 (5th Cir. 1980) (quoting *Pacific Molasses Co. v. F.T.C.*, 356 F.2d 386, 389 (5th Cir. 1966)); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–68 (1954) (agency must follow its regulations). In this case, the rule was not scrupulously followed.

The Government suggests that the BOP's noncompliance was harmless because it did not prejudice Gutierrez. Gov't Br. 31. The Government is wrong. The prejudice to Gutierrez is the same in this proceeding as in the last

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5. This ruling is the law of the case. The law-of-the case doctrine provides that matters decided expressly and by necessary implication "may not be reexamined either by the district court on remand or by [this] appellate court on a subsequent appeal." *United States v. Becerra*, 155 F.3d 740, 752 (5th Cir. 1998); *see also United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (discussing matters covered by doctrine). Matters beyond change by the courts are not subject to change by the opinion of an agency attorney that is contrary to an explicit court ruling.

one. The failure to comply with the regulation impaired the very due process rights the regulation is meant to secure. *Gutierrez*, 2011 WL 4807760, at *3–*6 (citing *United States v. White*, 431 F.3d 431 (5th Cir. 2005)). As before, an administrative determination about the medical necessity of forced medication is not a pointless exercise; it is the critical beginning point of the hierarchically ordered involuntary-medication proceedings. *Sell*, 539 U.S. at 170–71; *Gutierrez*, 2011 WL 4807760, at *3–*6. 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.

The refusal to make the required finding under § 549.43(a)(5), and thus to include it in the written report required by subsection (a)(6), also prejudiced Gutierrez by frustrating his administrative appeal rights. Gutierrez had the right to appeal the finding the facility administrator. *Gutierrez*, 2011 WL 4807760, at *3. He did appeal, and he did say that he did not need medication. (2 S.R. 172.) But the failure of Dr. Zula to comply with the regulation meant that the report reviewed by the warden omitted the crucial issue. To put it simply: the regulation requires that the BOP determine whether involuntary medication is medically necessary for the purpose for

which it is sought, and Dr. Zula never made that finding. A finding that is not made cannot be administratively appealed. Review that cannot address the central fact of a case is not meaningful review. Gutierrez was therefore prejudiced by the BOP's noncompliance.[6]

The Government returns to its implicit-finding contention in arguing that Gutierrez was not prejudiced by the BOP's noncompliance. As explained above, no such finding can be reasonably implied. Finally, the Government suggests that the unanimity of medical opinion that medication was necessary to restore competence, as expressed in the various reports of Gutierrez's treating psychiatrists and psychologists, and in the testimony of the medical professionals, including Gutierrez's expert, Dr. Cantu, at the *Sell* hearings, supports a finding that noncompliance with the regulation was harmless error. This argument again misses the central point—the hierarchically ordered process set out in § 549.43 and *Sell* is required and each step is necessary to

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6. Gutierrez notes that the Supreme Court has apparently left open the question of whether noncompliance with a regulation requires a showing of prejudice, when, as here, the regulation was designed to confer an important procedural benefit upon an individual. *See Yellin v. United States*, 374 U.S. 109 (1963); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *see also The Accardi Principle*, 74 GEO. WASH. L. REV. at 576–77. Thus, even if the Court were to conclude that there was no prejudice, vacation of the involuntary-medication order would be required. Given that the prejudice is clear and of the type that merited reversal in the last appeal, the *Yellin* question need not be addressed. *See Pacific Molasses Co.*, 356 F.3d at 387 n.3.

protect due process rights. *Gutierrez*, 2011 WL 4807760, at *3–*6. A *Sell* hearing can take place only when it is correctly ordered and, for it to be correctly ordered, the Government must first show compliance with the requirements of § 549.43 (and in this case with the prior opinion.) The Government cannot so show.

The Government cannot substitute what it heard at out-of-order, premature *Sell* hearings for its duties under the regulation. Thus, the hearing testimony is not relevant for purposes of deciding prejudice from the failure to follow the regulation. After all, in the first appeal in this case, the Government similarly argued that "any error [in failing to follow the regulation] was harmless because the end result would be the same," given the facts of this case. *Gutierrez*, 2011 WL 4807760, at *5–*6. This Court rejected that argument, stating "[t]he inmate's right to procedural due process stands apart from his substantive right not to be forcibly medicated unless the government meets the four *Sell* factors." *Id.* at *6 (citing *White*, 431 F.3d at 434).It continues to stand apart, and continues to be in need of vindication.

Because the regulation was not followed in this case, the *Sell* hearing in the district court was premature. The involuntary-medication order should be vacated. The case should be remanded to the BOP for compliance with the regulation.

III. THE FIRST *SELL* FACTOR—GOVERNMENT INTEREST—IS A MIXED QUESTION ON WHICH THE GOVERNMENT BEARS THE BURDEN OF SHOWING THE FACT NECESSARY TO JUSTIFY THE CONCLUSION.

(Responsive to Government Brief 43.)

The Government argues that, because the first *Sell* factor—whether the Government's asserted interest in forcing medication upon an accused is sufficiently important—is a legal issue that is subject to de novo review, it did not have to prove that factor by "clear and convincing evidence" in the district court. Gov't Br. 43 (citing *United States v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007)). This is the first time the Government has made this argument, even though Gutierrez has consistently maintained that the Government bears this burden of proof with regard to the factual questions underlying the first *Sell* factor.

To decide the first *Sell* factor, a court must "consider the facts of the individual case." *Sell*, 539 U.S at 180. Such facts include "whether a defendant's failure to take drugs voluntarily could mean lengthy confinement in an institution for the mentally ill," "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)," the timeliness of the prosecution, and any other "special circumstances" that would tend to lessen the Government's interest in bringing the defendant to trial for the alleged

offense. Gutierrez. Br. 25–37. Such facts must be established at the *Sell* hearing in the district court.

At that hearing, it is the Government that bears the burden of proving, by "clear and convincing evidence," *see United States v. Green*, 532 F.3d 538, 545 (6th Cir. 2008), the facts of the case. This would include facts that support its claim that bringing the particular defendant to trial is important enough to override his liberty interest in avoiding unwanted medication. The facts established at the hearing inform the district court's decision on the sufficiency of the Government's interest in the particular case. While the court's ruling on that overarching "legal" question—which is, more precisely, a mixed question of law and fact—is reviewed de novo, *see Palmer*, 507 F.3d at 303, its underlying factual findings must be reviewed for clear error, *see, e.g.*, *R.H. v. Plano Independent School District*, 607 F.3d 1003 (5th Cir. June 1, 2012).

That there are facts underlying the legal decision about the Government interest makes it obvious that the Government must establish those facts. That, before finding that there is a sufficient interest justifying involuntary medication, the district court must be convinced of facts such as the unlikelihood of civil commitment, the timeliness of the prosecution, and a likely sentence beyond the period the accused has already been confined, must

mean that the Government must establish such facts. To hold otherwise would mean that the Government met its burden by showing that it had gotten the grand jury to ratify the charge it wished to bring. That the other factual questions at the *Sell* hearing must be established by clear and convincing evidence strongly suggests that the facts underlying the first *Sell* factor must be so established.

In this case, the Government offered no evidence on the circumstances relevant to the first *Sell* factor. Thus, while Gutierrez believes that the factual predicate for the first factor is the Government's to establish by clear and convincing evidence, even if that is not so, the absence of any evidence supporting the Government's position on those circumstances shows that the district court erred. Forcible medication of Gutierrez is not warranted.

IV. THE GOVERNMENT FAILS TO SHOW A SUFFICIENTLY IMPORTANT INTEREST IN FORCIBLY MEDICATING GUTIERREZ. (Responsive to Government Brief 46–61.)

Gutierrez argues that the involuntary medication order must be reversed because the Government failed to show a sufficiently important governmental interest was at stake. An important governmental interest is the first factor under the *Sell* test. The existence of a serious criminal charge is, the *Sell*

court ruled, an important governmental interest. 539 U.S. at 180.[7] But the Court also made clear that the existence of a serious charge is not itself 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 in trial on the charge. A lessened interest can render forcible medication of the particular accused unwarranted. *Sell*, 539 U.S. at 180. *Sell* therefore requires that competing interests be weighed. Among the circumstances that may reduce the Government's interest in bringing a mentally ill person to trial are "the possibility that the defendant has already been confined for a significant amount of time," the timeliness of the prosecution, and the possibility of confinement in a mental institution. 539 U.S. at 180. Gutierrez argues that, in his case, all three of these factors

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7. Gutierrez argues that the district court misapplied the first *Sell* factor by treating the existence of a felony charge as sufficient by itself to satisfy the factor and rejecting Gutierrez's argument that it had to look at the specific facts of the case. Gutierrez Br. 24–27. Failing to consider that other circumstances could trump the mere existence of a serious charge meant that the district court could not fulfill its job 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 importance of the asserted interest. Gutierrez Br. 24–27 (quoting *Sell*, 539 U.S. at 181 (emphasis original)). The Government disagrees, and contends that, even if the district court misapplied the first factor, its findings on the second factor can stand. Gov't Br. 43. For the reasons given in the Gutierrez's opening brief, this is not so.

weigh against medicating him. Gutierrez Br. 27–37. Unsurprisingly, the Government disagrees, but the Government's arguments are unpersuasive.

A. The Amount of Time Gutierrez Has Been in Custody and the Slowness of the Prosecution Weigh Against Forcible Medication.

The *Sell* court ruled that the Government's interest in bringing a person accused of a "serious" offense to trial could satisfy the threshold "important interest" inquiry of the first factor. 539 U.S. at 180. The *Sell* court did not provide much general guidance as to what a serious offense might be. This Court later decided that crimes that carry a punishment of more than six months' imprisonment are "serious" crimes. *United States v. Palmer*, 507 F.3d 300, 304 (5th Cir. 2007). The Court also held that it is "appropriate" to consider the maximum penalty. *Id.* This general guidance on what constitutes a serious crime did not, of course, displace the command of *Sell* to look at the circumstances of the particular case in deciding whether the governmental interest in trying a particular mentally ill person was of sufficient importance to justify forced medication.

The Government, in attempting to show that its interest in trying this case is sufficiently important, relies on *Palmer*. Gov't Br. 46–47. It emphasizes that Gutierrez faces a maximum sentence of 20 years' imprisonment, and it demonstrates an impressive facility for ringing up the guideline range. These

facts, the Government claims, show a need for bring Gutierrez to trial.[8] Although the statutory maximum is appropriately considered under *Palmer*, and the sentencing guideline range can be considered, neither shows an interest in prosecution sufficient to overcome the special circumstances of Gutierrez's case. In fact, the Government's reliance on them highlights the weakness of the actual interest it has in bringing Gutierrez to trial. The statutory maximum that applies and the Government's guideline calculations tell us more about the Government than about the case.

The Government has complete control over what the charge is, and thus over the maximum sentence an accused is facing. That the first *Sell* factor is a legal question suggests strongly that it involves more than simply looking to see if the prosecutor has lodged a charge that carries a sentence of more than six months. Even that would be a minor task; the overwhelming majority of federal offenses carry such a sentence. If the *Sell* court had thought the

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8. Obviously, threats to kill could be serious. In this case, however, the threats were telephonic expressions of delusions, not rational, malevolent warnings issued by a criminal. The context of the actions alleged to have constituted the crime must be considered in evaluating the seriousness of the offense and the importance of prosecuting it. The Government does not account for context. It simply assumes the worst of a man who all agree is, and has been for years, mentally ill. Indeed, the Government's argument is almost ahistorical. The Government claims trial is needed because Gutierrez has engaged in similar conduct in the past. Gov't Br. 49. Yes, Gutierrez has been delusional and mentally ill in the past. Trying him will not make him better. Commitment and treatment might.

statutory maximum was the determining factor, it would have said so and there would have been no reason for it to go further and set out the special circumstances that must be considered. Nor, realistically, would there be anything for a court to decide if a high statutory maximum were enough—the Government would, by getting the grand jury to ratify the charge under the statute it chose, automatically establish the first *Sell* factor. *Sell* did not make the statutory maximum the measure of the Government interest. Nor did *Palmer*, which merely used it to define "serious." Since the *Sell* Court declared that involuntary medication was to be "rare," 539 U.S. at 180, more is needed than the prosecutor picking a charge with a 20-year statutory maximum. The Government must show that the special circumstances of the case warrant trial of a mentally ill person.

The Government's remarkable guideline calculations—it has managed to turn a telephone call by a mentally ill, delusional man into an offense that carries a guideline range above the 20-year statutory maximum—are an attempt to show that trial is important because Gutierrez will, if convicted, spend much more time incarcerated than he has already. Gov't Br. 48–49 & n.8. This attempt fails. The possibility that the accused has already spent a significant amount of time in detention is one of the *Sell* special circumstances. 539 U.S. at 180. Gutierrez has been detained on the charges

against him for 34 months. That is a significant amount of time. Indeed, it is longer than the likely sentence he would receive if he were ever to be found guilty. In the district court, Gutierrez estimated that the likely advisory guideline range for his offense would be 15 to 21 months' imprisonment. (2 S.R. 92 n.7.) The Government did not take issue with that range. Now, on appeal, it has decided that the range could be 235 to 293 months' imprisonment. Gov't Br. 48–49.

If the Government had responded in the district court to Gutierrez's guideline calculations, the parties could have asked the court to have the U.S. Probation Office prepare a report calculating the likely guideline sentence in advance of the *Sell* hearing. That information would have been available when evaluating the sufficiency of the government's asserted interest. *See, e.g., United States v. Sherman*, 2006 WL 1127006, unpub. op., at *1 (D. Ariz., Apr. 27, 2006) (before *Sell* hearing "probation was ordered to prepare a report calculating the likely guidelines sentence"). However, the Government did not dispute the range Gutierrez offered. Its belated attempt to drive up the range shows only that the Government failed to meet its burden of showing a significant interest.[9] The record in the district court, and

9. In any event, the Government's projection of the likely guideline range is off base. For example, contrary to the Government's belief, it is unlikely that Gutierrez (continued…)

the Government's acquiescence to it, show that the 34 months Gutierrez has already been detained are likely to exceed any sentence that might be imposed. Most important, the record makes it highly unlikely that the district court would impose anything like the sentence the Government conjures from the guidelines. The judge has repeatedly expressed sympathy for Gutierrez and his condition and has stated that he thought it was important for "Gutierrez [to] have a life." *See, e.g.,* (2 S.R. 283).

The Government also asserts that it has an interest in prosecuting Gutierrez because, if it obtains a conviction, Gutierrez will be a felon and thus unable to possess a firearm. Gov't Br. 54. No prosecution is needed for that purpose. Gutierrez had been civilly committed in the past. (1 S.R. 6–7.) Thus, he is already prohibited from possessing a firearm. *See* 18 U.S.C. § 922(g)(4). The Government also says that it is important to prosecute Gutierrez to "send[ ] a message to the public that it takes seriously threats to

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9. (…continued)
would be subject to the "official victim" enhancement, *see* U.S.S.G. §3A1.2(a) and (b). Gov't Br. 48 n.8. To show eligibility for the enhancement, the Government would likely need show that the victims' statuses were the "sole reason" that a delusional Gutierrez made the calls. *See, e.g,. United States v. Williams*, 520 F.3d 414, 423–24 (5th Cir. 2008) ("sole reason" test). The Government's other suggestions are similarly flawed. Indeed, although it proposes increases under U.S.S.G. §2A6.1(b)(2) and (b)(4), the Government concedes, it "is not clear" whether there is any evidence to support such increases. Gov't Br. 48 n.8.

public officials, and that such threats will carry consequences." Gov't Br. 49. In the light of the facts—which no one has seriously disputed—that Gutierrez is mentally ill and that the Government has made only gestures against the reality that Gutierrez was insane at the time of the offense, it makes little sense to say that the public needs a message that mentally ill people will be prosecuted and restrained, rather than treated and returned to health. The Government's arguments that its interest in bringing Gutierrez to trial more than three years after his delusional telephone calls overrides Gutierrez's liberty interest in avoiding forcible medication are unpersuasive.[10]

B. The High Probability of Civil Commitment Weighs Against Forcible Medication.

The Government suggests that there are "benefits to bringing Gutierrez to trial wholly apart from any amount of time he might be incarcerated." Gov't Br. 53. If Gutierrez is convicted, the Government explains, he will likely be subject to a period of supervised release, during which the [federal] government would be able to "monitor him," "ensure that he takes his medications," and help him to maintain a "stable, non-violent lifestyle."

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10. The Government claims that "[t]he record demonstrates that the government has consistently prosecuted this case in a timely manner." Gov't Br. 54 n.11. It has not. The BOP has delayed this case by declining to follow the straightforward language of the controlling regulation. Gutierrez Br. 31.

Gov't Br. 53–54.[11] The Government has failed to explain why these "benefits," for society and Gutierrez, could not be realized through civil commitment under 18 U.S.C. § 4246. Nor has it addressed the district court's finding that, if Gutierrez is not forcibly medicated for trial, "he will spend the rest of his life in a hospital." (2 S.R. 194.) That finding exactly accords with the type of special circumstance that the *Sell* court ruled would weigh against forcible medication. 539 U.S. at 180.

Indeed, in response to Gutierrez's argument that his potential for civil commitment under § 4246 dilutes the government's interest, Gutierrez Br. 28–30, the Government does not argue that Gutierrez is unlikely to be committed. It states only that "[o]n the basis of the current record . . . the potential for civil commitment is uncertain[.]" Gov't Br. 50. According to the

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11. Insofar as the Government is suggesting, as did the district court, that the federal government has a "big interest" (2 S.R. 283), in the long-term care and treatment of the mentally ill by involuntarily medicating, prosecuting, and supervising persons indefinitely, that view of the federal government and its role in society is not universally accepted. *Cf. United States v. Duncan*, Slip Copy, 2012 WL 1566177 (W.D. Tex. 2012) (Austin, M.J.) (recommending an insanity acquittee's discharge under § 4243(f), and explaining, in response to the argument that he should remain on supervision due to the "difficulties he would likely face upon release," that "[t]he altruistic impulses of the government, no matter how well intended, cannot alone override the liberty interests of the committed person seeking freedom." (citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975)). The states, not the federal government, have traditionally been responsible for the care and treatment of the mentally ill.

Government, Gutierrez may be dangerous, given his stated belief "he will receive directions from God to inflict harm on others," but "[o]n the other hand" he may not be, given that prison officials have concluded that he "is not a danger to himself or others in the prison hospital setting," and has "apparently been released from civil confinement in the past." Gov't Br. 50–51.

This argument lacks coherence, and support in the record. The Government would like the Court to accept that Gutierrez is so dangerous an offender that he must be forcibly medicated, tried, and imprisoned and simultaneously to accept that Gutierrez is so undangerous that he cannot be civilly committed. This is an untenable proposition, one that relies on a false equivalence between a prison hospital and the outside world.

If the Government really believed that the mentally ill Gutierrez was not dangerous enough to be committed, it would have adduced some evidence supporting that claim. It did not. At the least it would have objected that the district court was wrong in its repeated assertions that Gutierrez would, if not forcibly medicated, have to spend the rest of his life in a mental hospital. (2 ?? S.R. ??) It did not. On appeal, the Government offers only the inapposite assertion that "prison officials have concluded that Gutierrez is not a danger to himself or others in the prison hospital setting." Gov't Br. 50. Of course,

in a civil commitment hearing, the question would not be whether Gutierrez was dangerous in a prison hospital setting; it would be whether he posed a danger to himself or others in the larger world. *See* 18 U.S.C. § 4246(d) (setting out standard for commitment determination). Despite its reliance on Gutierrez's delusional denunciations of various people and the mad letters he wrote to the district court, Gov't Br. 50, the Government now claims that there is insufficient evidence to suggest that Gutierrez poses a danger in the outside world that would allow him to be civilly committed. These inconsistent positions must be resolved in favor of Gutierrez's liberty interest in remaining free from forcible medication. Involuntary medication cannot be warranted when the Government's position is so malleable.[12]

The Government's argument does not fail only because of its inconsistency. It also fails in light of the district court's finding. The court found that if Gutierrez is not forcibly medicated for trial, he will spend the

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12. The Government enjoys playing off a stereotype of Austin, Texas, as an indulgent, hands-off place that tolerates oddness in its residents. It quotes Dr. Cantu as saying that civil commitment in Austin requires that the person be caught with a bomb or a gun. Gov't Br. 51 n.10. This quote is colorful and interesting. Alas it cannot be accurate. Gutierrez has been civilly committed before. No gun or bomb was involved, only mental illness, as is sufficient for commitment in other cities. The record also shows that, in making his colorful comment, Dr. Cantu was referring to "outpatient commitment," or followup treatment of a person released from civil commitment. Nor did Dr. Cantu offer an opinion that Gutierrez is unlikely to be committed under the standards of § 4246.

rest of his life in a hospital. (2 S.R. 194.) The district court did not, however, correct apply the law of *Sell* to its finding, but this Court, reviewing the legal matter de novo, can. Under *Sell*, the court's finding means that there is not a sufficiently important interest or need for a criminal trial of Gutierrez. *Sell*, 539 U.S. at 180.

The Government elides the significance of the district court's finding under *Sell*. It prefers to focus on cases in which courts of appeals have upheld forcible medication because commitment was not likely. Those cases are inapposite. This is not a case in which the district court found it "impossible" "to predict how likely it is" that the accused would be civilly committed. Gov't Br. 51 (citing *United States v. Grape*, 549 F.3d 591, 601–02 (3d Cir. 2008)). This is not a case in which a court has said "there is little, if any, evidence that [the accused] would qualify for civil commitment." *United States v. Gomes*, 387 F.3d 157, 161 (2d Cir. 2004) (cited at Gov't Br. 51). This is not a case in which a court has found that there is only "a slim possibility" of civil commitment. *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 694 (9th Cir. 2010) (cited at Gov't Br. 51).[13] This is a case in which the

13. In *Palmer,* a case from this Court, the accused had been evaluated for civil commitment and found not to be a candidate. 507 F.3d 301–02.

district court specifically found a certainty of civil commitment. (2 S.R. 194.)[14] That finding renders the Government's contrary claims incorrect and greatly reduces the Government's interest in trying Gutierrez. Even the potential of future civil confinement "diminish[es] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime," and therefore affects the strength of the government's interest in prosecution. *Sell*, 539 U.S. at 180. This is a case in which the district court has found that there is a near certainty of commitment.

If this Court were to conclude that the Government is correct that the facts as developed at the district court hearing(s) were insufficient to show Gutierrez's prospects for civil commitment, then that would only prove that the Government failed to satisfy its burden of proof under the first *Sell* factor. After all, to meet its burden on the factor, the Government had to show a

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14. The civil commitment process is straightforward. It is set out in 18 U.S.C. § 4246. If this Court vacates the forcible-medication order, the process can be started. If the district court makes the requisite findings under § 4246(a) and (d), it must commit Gutierrez to the custody of the Attorney General. *Id*. § 4246(d). But the Attorney General must then release him to the State in which he is domiciled (*i.e.*, the State of Texas) if it is willing to assume responsibility for his custody, care, and treatment. *Id.* If the State of Texas will not accept Gutierrez despite "all reasonable efforts" of the Attorney General, then the Attorney General must hospitalize him for treatment in a suitable facility (such as FMC Butner), but must "continue periodically to exert all reasonable efforts to cause . . . a State to assume . . . responsibility for the person's custody, care, and treatment." *Id.*

sufficiently important interest. If it failed to dispel the likelihood of civil commitment that arises from the nature and length of Gutierrez's illness, it has only itself to blame; Gutierrez did not have the burden of proof.

In the end, the Government's resistance to civil commitment in the face of the record appears to stem from its concerns about burdens of proof. The Government suggests that it has a sufficiently important interest in forcibly medicating Gutierrez to try him for the simple fact that he would bear the burden of proving his affirmative defense at trial. "The purpose of pursuing a trial against Gutierrez," it writes, "is to permit a jury or judge to determine" whether Gutierrez has proven by clear and convincing evidence that he did not appreciate the nature and qualify of the wrongfulness of his acts." Gov't Br. 58. This position is unconvincing. As even the Government has conceded, there is already "ample evidence that is probative of Gutierrez's mental state at the time of the offense." Gov't Br. 57. The district court has seen and heard this "ample evidence" and it has determined that it "has little doubt that Gutierrez will ultimately be found insane." (2 S.R. 195.) It has all but guaranteed a not guilty verdict: "I'm going to find him not guilty as a reason of incompetency, just as I have others over the years." (2 S.R. 281.) As a practical matter, there is nothing to be gained by forcibly medicating Gutierrez to try him.

The only thing to be gained is an easier burden of proof for the Government at a commitment hearing. Under § 4243(d), the Government points out, Gutierrez, if he were found not guilty by reason of insanity, would bear the burden of proving by "clear and convincing" evidence that he is not dangerous, whereas under § 4246(d), the government bears that burden. Gov't. Br. 58-60. In light of the district court's finding about the near certainty that Gutierrez will remain ill, and hospitalized, the difference in the burden cannot be reason to override Gutierrez's liberty interest. The purpose of a *Sell* hearing is to determine whether the Government has a prosecution interest sufficiently important to overrun the defendant's liberty interest in avoiding forced medication. *Sell* identified civil commitment as an alternative to forced medication, not as the objective of forced medication. Here, the district court found it is a near certainty that Gutierrez will remain hospitalized, and the Government has not shown that finding to be clearly erroneous. There is no reason therefore for him to be one of the "rare" persons forcibly medicated for trial. *Sell*, 539 U.S. at 179–80.

The district court's forcible-medication order should be vacated. The case should be remanded for dismissal of the charges and other appropriate proceedings.

CONCLUSION

FOR THESE REASONS, as well as the reasons set forth in Gutierrez's opening brief, the Court should vacate the order of involuntary medication.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of June, 2012, I electronically filed the Reply Brief with the Clerk of Court using the CM/ECF system which will send notification of such filing to John M. Pellettieri, Attorney, U.S. Department of Justice, Criminal Division and 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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