United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2019 Decided October 4, 2019
Reissued October 22, 2019

No. 18-3082

UNITED STATES OF AMERICA,
APPELLEE

v.

JEAN-PAUL GAMARRA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00065-1)

Lisa B. Wright, Assistant Federal Public Defender, argued the cause for appellant. With her on the briefs was *A.J. Kramer*, Federal Public Defender. *Tony Axam Jr.* and *David W. Bos*, Assistant Federal Public Defenders, entered appearances.

Nicholas P. Coleman, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jessie K. Liu*, U.S. Attorney, and *Elizabeth Trosman*, and *Chrisellen R. Kolb*, Assistant U.S. Attorneys.

Before: ROGERS and PILLARD, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* PILLARD.

RANDOLPH, *Senior Circuit Judge*: This is a criminal case. The defendant, Jean-Paul Gamarra, appeals from an order of the district court. The order authorized the government to medicate him without his consent for the purpose of rendering him competent to stand trial.

Questions about Gamarra's soundness of mind arose from these largely undisputed circumstances of his arrest on March 28, 2017. Gamarra approached a Secret Service Agent stationed near the Treasury Department Building, adjacent to the White House. Gamarra told the Agent that he had a package containing a "nuclear bomb detonator or defuser." The Agent ordered Gamarra to place his package on the ground. On the package were messages: "Warning this is a ~~tre~~ threat on the President and Senator life Secure Keyboard to be Reversed Engineered," and "Warning 100% threat Brand New Electronic Detonator Device president Secrete Servisce Explosive technology Department." On the package's label was this: "Blue tooth Bomb Explosion Component."

In response, the Agent arrested Gamarra while other law enforcement officers closed the surrounding areas to pedestrian and vehicular traffic for an hour and a half. When officers examined Gamarra's package they found only an ordinary Bluetooth keyboard.

A grand jury indicted Gamarra for threatening bodily harm to the President (18 U.S.C. § 871) and for conveying false information concerning the use of an explosive (18 U.S.C. § 844(e)).

Gamarra's actions raised doubts about whether he was competent to stand trial. On the government's motion, the magistrate judge ordered Gamarra committed to custody for the purpose of evaluating his competency. A forensic psychologist examined Gamarra and concluded that he suffered from a 'schizoaffective disorder' and that he was not competent to stand trial. After a hearing, the Magistrate Judge agreed and issued an order under 18 U.S.C. § 4241(d) committing Gamarra to continuing custody for the purpose of determining whether he could become competent. This subsection provides, in part:

> The Attorney General shall hospitalize the defendant for treatment in a suitable facility . . . for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward[.]

After some delay, Gamarra was transferred to the Federal Medical Center, Butner, North Carolina. A psychology intern at Butner and her supervisor, a forensic psychologist, attended to Gamarra and signed a report. From multiple clinical evaluations, interviews and observations, they concluded that Gamarra suffered from delusional thinking and disorganized speech. His medical history and the accounts of his family members indicated that he could not become competent without anti-psychotic medicine. At Butner, Gamarra started taking the prescribed medication, but within a short time became noncompliant.

The government therefore moved for an order authorizing involuntary medication. After a three-day evidentiary hearing, the Magistrate Judge recommended denying the motion on the ground that the government failed to provide treatment to Gamarra within the four month period specified in 18 U.S.C. § 4241(d)(2). The district court rejected the recommendation and granted the government's motion, concluding that under *Sell v. United States*, 539 U.S. 166 (2003), "the government had met its burden of proof with respect to each of the four *Sell* factors." *United States v. Gamarra*, 2018 WL 5257846, *9 (D.D.C. 2018).

Gamarra's appeal is limited to the district court's rulings on two of the four *Sell* factors – the second and the fourth. The second *Sell* factor requires the government to establish that "the administration of the drugs is substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Sell*, 539 U.S. at 181. The fourth *Sell* factor requires the government to establish that "administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." *Id.*

The district court's conclusions in favor of the government must rest on "clear and convincing evidence." *United States v. Dillon*, 738 F.3d 284, 291 (D.C. Cir. 2013). Our review of those conclusions is for "clear error." *Id.* Under this standard, we may reverse only "if (1) the findings are 'without substantial evidentiary support or ... induced by an erroneous application of the law'; or if (2) 'on the entire evidence [we are] left with the definite and firm conviction that a mistake has been committed." *Id.* at 297 (quoting *Cuddy v. Carmen*, 762 F.2d 119, 124 (D.C. Cir. 1985)).

Gamarra's objections to the district court's assessment of the second *Sell* factor are that the court should not have relied on the opinion of Butner's head psychiatrist – Logan Graddy, M.D. – because Dr. Graddy did not personally examine Gamarra, and because he ignored Gamarra's recollection and his medical records regarding the side effects he experienced when he took anti-psychotic medications in the past.

Although Dr. Graddy acknowledged that it was "unusual" and "unfortunate" that he was offering an opinion without a personal examination, Gamarra has failed to identify how the lack of a personal examination compromised Dr. Graddy's conclusion that the second *Sell* factor was satisfied. Moreover, courts have relied on experts who reached their opinions based on a review of a patient's medical records and other information without personally conducting an examination. *See Jones v. Sec'y, Fla. Dep't Of Corr.*, 834 F.3d 1299, 1315–16 (11th Cir. 2016) (collecting cases in which courts relied on a medical expert who had not personally examined the patient). As the district court noted, an opinion of the American Psychiatric Association's Ethics Committee then in effect concluded that it was both ethical and common for a "'forensic expert to offer opinions' based on review of records and without examining the defendant in person." *Gamarra*, 2018 WL 5257846 at *10 (quoting American Psychiatric Ass'n, *Opinions of the Ethics Committee on The Principles of Medical Ethics* 35 (2017), available at https://www.psychiatry.org/psychiatrists/practice/ethics). The government's burden here was higher than under the common preponderance of evidence standard. But Gamarra has identified no countervailing authority connecting the lack of personal examination with a failure to meet that burden.

The district court also did not clearly err in concluding that the prescribed medication was substantially unlikely to cause side effects impairing Gamarra's ability to assist his counsel.

Dr. Graddy reviewed Gamarra's medical history, including medical records of Gamarra's previous experiences taking anti-psychotic medication. Dr. Graddy based his judgment on those records, on his clinical experience, and on his review of the medical literature regarding the effects of anti-psychotic medication. Gamarra argues that Dr. Graddy's conclusion affords insufficient weight to Gamarra's experiences in taking anti-psychotic medication. Dr. Graddy acknowledged the side effects and explained how they would be managed if they recurred. The District Court did not clearly err in crediting Dr. Graddy's opinion. We assume that Gamarra will be returned to FMC Butner and that, as Dr. Graddy testified, the medical personnel at that facility will adjust Gamarra's medication to minimize side effects. Were side effects to require attention while Gamarra is in the District of Columbia awaiting trial or during trial, the district court should ensure appropriate medical personnel will promptly respond.

Accordingly, the district court did not commit any clear error regarding the second *Sell* factor.

Gamarra's arguments regarding the fourth *Sell* factor overlap with his arguments regarding the second *Sell* factor. We are again told that the district court should not have credited Dr. Graddy's opinion on medical appropriateness because he did not interview Gamarra. Once again, Gamarra has failed to identify how the district court clearly erred in relying on Dr. Graddy's testimony to determine that the government satisfied the fourth *Sell* factor. The fact that Dr. Graddy did not personally examine Gamarra does not detract from his finding that Gamarra's symptoms would be ameliorated through medication. Dr. Graddy understood Gamarra's condition from his review of the medical records and reports of forensic psychologists who interacted with Gamarra. We therefore believe Gamarra has presented no basis for concluding that the district court clearly

erred in relying on Dr. Graddy to conclude that involuntary medication would be in Gamarra's best medical interests.

For the reasons stated above, the district court's order authorizing involuntary medication is

Affirmed.

PILLARD, *Circuit Judge*, concurring: A district court order authorizing the forcible medication of an incompetent defendant has serious consequences, implicating the defendant's "significant constitutionally protected liberty interest in avoiding the unwanted administration of anti-psychotic drugs." *Sell v. United States*, 539 U.S. 166, 178 (2003) (internal quotation marks omitted) (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). Medication "changes one's mental state—one's very thought processes—and in a way that can't be resisted by any effort." Elyn R. Saks, *Refusing Care: Forced Treatment and the Rights of the Mentally Ill* 87 (2002). State-imposed medication raises the stakes even further, conjuring up plots of dystopian science fiction.

The Supreme Court has held that forced medication to render a defendant competent for trial is intended to be "rare," appropriate only when the four specified "*Sell*" factors are satisfied. *Sell*, 539 U.S. at 180. These factors permit forcible medication only where (1) "*important* governmental interests are at stake"; (2) "involuntary medication will *significantly further* those concomitant state interests" by administration of drugs "substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense"; (3) "involuntary medication is *necessary* to further [state] interests"; and (4) "administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." *Sell*, 539 U.S. at 180-81. In the aftermath of *Sell*, lower courts have further acknowledged the gravity of this step by requiring the government to demonstrate that the *Sell* factors are met by clear and convincing evidence. *See, e.g.*, *United States v. Dillon*, 738 F.3d 284, 291-92 (D.C. Cir. 2013) (collecting cases).

The government must exercise exacting diligence to meet its burden. The grave risks involuntary psychotropic medication pose to a person's liberty and autonomy—his say over what is done to his own brain—call for heightened attention. This is especially so given the broader context in which forcible medication may occur. Not only does the government control whether to initiate prosecution against incompetent defendants, it oversees the medical personnel in federal facilities who observe such defendants and, where warranted, treats them, and it determines in the first instance whether such defendants have been rendered competent for trial. As a result, the government almost always has superior expertise and access to information than does defense counsel or the courts. Defense counsel, for their part, face extra challenges posed by the imperative to mount the most powerful and comprehensive defense while guided by the wishes of a client who, even though not competent for trial, retains legal authority to direct his representation. These unusual background conditions strain our adversary system.

This case illustrates these complexities and raises questions about whether the government has met its burden under the demanding *Sell* standard. The government seeks to medicate Gamarra against his will based almost exclusively on the report and testimony of a single psychiatrist, Dr. Graddy, without requiring or outlining any specifics regarding the dosage and timeframe of the envisioned course of treatment, in a context where Gamarra has already spent longer in detention than he will for any sentence he is likely to receive. By the time of the *Sell* hearing, Gamarra had been detained for seven months, but Dr. Graddy had not met with him, and it does not appear that any psychiatrist or other health care provider sought to establish a consistent therapeutic relationship with him. The record is thin—quite frankly, thinner than it should be—as to

the current importance of the government's interest in this prosecution, the details and rationales of the planned treatment, the extent to which voluntary compliance was meaningfully sought as a less restrictive means, and whether the specific drug chosen is the best one.

Most of the questions these circumstances evoke were not raised on appeal. And our review is for clear error. The standard of review reflects the institutional advantage of district courts' first-hand evaluation of factual circumstances—an advantage especially significant in the context of highly contextual decisions regarding psychiatric intervention. I therefore join the panel opinion. Nonetheless, because approving the forcible administration of medication here without additional comment threatens "the sensitive balancing required by *Sell* in light of the significant liberty interests implicated by forcible medication," *id.* at 296, I write separately to highlight benchmarks we expect the government to meet when requesting approval for forcible medication going forward, with the hope that these benchmarks provide useful guidance to district courts evaluating such motions in future cases.

I.

The government must show by clear and convincing evidence that it has a continuing, important interest in forcibly medicating an incompetent defendant. *Sell*, 539 U.S. at 180. Satisfying that first *Sell* factor requires the government to provide affirmative answers to "two distinct questions": First, "whether the charged crime is 'serious,' because the Government's interest in a prosecution generally qualifies as 'important' when the defendant is charged with a serious crime"; and, second, whether no "'[s]pecial circumstances . . .

lessen the importance of that interest.'" *Dillon*, 738 F.3d at 292 (quoting *Sell*, 539 U.S. at 180). The government's ordinarily strong interest in prosecuting serious crimes may be offset where there are countervailing considerations, such as "the prospect of lengthy civil commitment" or "an extended period of pretrial detention." *Id.*; *see also Sell*, 539 U.S. at 180.

Subjecting a defendant to an extended period of pretrial detention may lessen the government's penal interest to the point that it no longer justifies forcibly medicating the defendant. Gamarra has been in detention on these charges since March 28, 2017. *See* Gamarra Rule 28(j) Letter (filed 9/6/19). The government calculated Gamarra's likely Guidelines range, in the event that he is convicted of the charges against him, to be from 21 to 27 months in prison. J.A. 100. We have yet to decide this issue, but other circuits, faced with charged crimes they treat as "serious," compare the recommended Guidelines range that the defendant is likely to face if convicted to the amount of time the defendant has already spent in custody. *See, e.g.*, *United States v. Berry*, 911 F.3d 354, 362-63 (6th Cir. 2018); *United States v. Grigsby*, 712 F.3d 964, 973-74 (6th Cir. 2013); *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 694 (9th Cir. 2010); *United States v. White*, 620 F.3d 401, 413-19 (4th Cir. 2010). They do so because the Bureau of Prisons is required to credit pre-trial detention toward any term of imprisonment imposed, *see* 18 U.S.C. § 3585(b)(1), and because "[w]here a defendant has already served sufficient time that a guilty verdict will result only in a sentence of time served, the deterrent effect of imprisonment has evaporated," *Berry*, 911 F.3d at 363. The government has already detained Gamarra for longer than the recommended Guidelines range. It will need to detain him for several more weeks to medicate him and bring him to trial. Whatever specific deterrent effect a post-conviction term of

imprisonment is supposed to have on the defendant, section 3585(b)(1) tells us, will be effectively achieved by that time.

Governmental interests in criminal prosecution extend beyond incapacitation and deterrence of the particular defendant. *Sell*, 539 U.S. at 186; *Dillon*, 738 F.3d at 296. They include the "significance for society" of a prosecution, including achieving general deterrence. *United States v. Onuoha*, 820 F.3d 1049, 1056 (9th Cir. 2016); *see also United States v. Gutierrez*, 704 F.3d 442, 451 (5th Cir. 2013). The government may also pursue a prosecution to secure a term of supervised release with specified conditions that follow incarceration. *See Onuoha*, 820 F.3d at 1056; *United States v. Mackey*, 717 F.3d 569, 575 (8th Cir. 2013); *Gutierrez*, 704 F.3d at 451. The law places a burden on the government up to the time of forcible administration of psychotropic medication to have a current, important interest in prosecuting the defendant that suffices to justify that grave intrusion. The government has not explained in any but the most general terms how these interests are promoted by the prosecution of Gamarra. We do not, however, resolve the issue here because Gamarra has failed to appeal the district court's conclusion that the first *Sell* factor has been satisfied.

II.

The government may forcibly medicate a defendant only where no treatment short of forced medication would render the defendant competent to stand trial, such that "involuntary medication is *necessary* to further" the government's interest in prosecution. *Sell*, 539 U.S. at 181. In other words, a court cannot approve involuntary administration of psychotropic medication unless the government produces clear and convincing evidence that any "alternative, less intrusive

treatments are unlikely to achieve substantially the same results." *Id.* Of particular import is whether medical staff have adequately attempted to encourage the patient's voluntary compliance with a medication regimen before they resort to administering medication by force.

Here, too, Gamarra fails to make any argument on appeal. Indeed, with the government focused on obtaining authorization to administer medication even over Gamarra's objections, and Gamarra insisting that *no* medication is necessary to render him competent, neither party fully explored what would appear to be critical terrain: Which treatment regimen is most likely to achieve the best results in pursuit of the public interest with the least intrusion on the defendant's fundamental rights. The record convincingly supports the conclusion that medication is an essential ingredient to restoration of Gamarra's competence. But that is hardly the end of the medical or legal story.

The record does not paint a clear picture as to how or whether the government considered medically informed measures to enhance the prospect of voluntary compliance. Nor does it explain in any detail any measures to minimize Gamarra's risk of side effects—let alone any measure that might limit or ameliorate the trauma associated with involuntary administration. Any psychiatrist, Dr. Graddy included, would agree that the prospects for voluntary compliance with a course of psychotropic medication depends on establishing a consistent therapeutic relationship. Indeed, Dr. Graddy testified that he believed "therapy plus medications is the best treatment for pretty much any psychiatric problem." *See* 4/13/18 Hr'g Tr. at 119. Yet, remarkably, it appears from the record that no psychiatrist had seen Gamarra in person, and that no therapist of any sort had established a therapeutic

relationship with Gamarra or treated him on a regular basis during the time from September 2017 to April 2018 that he had been detained pursuant to a court order to "hospitalize the defendant for treatment in a suitable facility." 18 U.S.C. § 4241(d).[1]

The magistrate judge's order authorizing commitment at Butner stated, in accordance with 18 U.S.C. § 4241(d)(1), that the purpose of confinement was "to determine whether there is a substantial probability that in the foreseeable future [Gamarra] will attain the capacity to permit the proceedings to go forward." J.A. 31. Gamarra arrived at Butner in September 2017 and was confined there for seven months prior to his *Sell* hearing. During that period, Dr. Graddy could not recall a single in-person meeting with Gamarra, stating only that "I may have seen him around. I don't know. I looked at his picture. I'm not sure honestly." 4/13/18 Hr'g Tr. at 135. Dr. Graddy points to the fact that he "received updates" from Dr. Laura Enman, a clinical pharmacist, *id.* at 112, but she appears only to have dispensed medication when Gamarra asked for it, and was not in a position to support compliance even with that limited treatment regimen. A staff psychologist, Dr. DuBois, saw Gamarra 5-7 times, and a graduate student intern, Ms. Laxton, saw Gamarra 13-15 times before completing their report in January 2018. But it appears that their primary purpose was to observe him for purposes of writing their report, in which context they occasionally challenged some of his

[1] Whatever the situation when Dr. Graddy testified, it appears that current ethical guidelines would not support testimony by a psychiatrist who did not make reasonable efforts to examine the patient in person. *See* American Psychiatric Ass'n, *Opinions of the Ethics Committee on The Principles of Medical Ethics* 25 (2019), available at https://www.psychiatry.org/psychiatrists/practice/ethics.

delusional beliefs; the record does not cast them in a therapeutic role. Dr. Graddy confirmed at the *Sell* hearing that "no one who was supervising Mr. Gamarra from a psychiatric standpoint" between October 2017 and April 2018 "had a medical degree." 4/13/18 Hr'g Tr. at 138. Apart from recounting those contacts, the record says nothing about what individual therapeutic attention, if any, Gamarra received at Butner.

Under these circumstances, I am skeptical that the record contains clear and convincing evidence that no treatment short of forcible medication could have rendered Gamarra competent for trial. Indeed, the magistrate judge in this case recommended that the government's *Sell* motion be denied precisely because she was uncertain whether Gamarra had received treatment at all. J.A. 153-57. Although she framed this question as preliminary to the *Sell* inquiry as a whole, her concern also goes to whether the government has met its burden under the third *Sell* factor. Of course, none of this is to question the basic premise on which all treating personnel agreed, namely, that some form of medication would be required to render Gamarra competent. The only issue here is whether the government met its burden of showing that garnering voluntary compliance, most likely in the context of an in-person therapeutic relationship, could not succeed. Revealingly, Dr. Graddy testified that only with a *Sell* order in hand would he embark on "hav[ing] a conversation with [Gamarra] about what medication he wanted to start," and that "with [Gamarra's] input, he could voluntarily decide at that point to take medication in conjunction with the court order." 4/13/18 Hr'g Tr. at 123. To decide in favor of involuntary medication in these circumstances puts the cart before the horse.

As noted above, Gamarra did not press this issue. In general, however, a court should approve a *Sell* order only where the government can demonstrate by clear and convincing evidence not only that psychotropic medication is needed, but also that medically appropriate efforts at voluntary compliance have been made and were not successful.

III.

Finally, in evaluating whether forcible medication is warranted, district courts must also look beyond the immediate goal of gaining competency for trial to determine whether the particular treatment proposed to that end is in the defendant's best interest. Under the fourth *Sell* factor, courts must therefore "conclude that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition." *Sell*, 539 U.S. at 181. The "specific kinds of drugs at issue may matter here as elsewhere" because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id.* This factor raises a series of issues that district courts should grapple with in resolving *Sell* motions.

First, the government's medical personnel should provide a specific treatment plan to serve as the basis of their analysis of the benefits and side effects of medication, and the court's review of that analysis. As the Tenth Circuit persuasively observes, "without knowing which drugs the government might administer and at what range of doses, a court cannot properly conclude that such a vague treatment plan is 'medically appropriate.'" *United States v. Chavez*, 734 F.3d 1247, 1253 (10th Cir. 2013) (quoting *Sell*, 539 U.S. at 181).

Here, it is unclear what the Butner staff have in mind as Gamarra's treatment plan. Other than stating that "the antipsychotic medication I will first offer Mr. Gamarra is risperidone," Dr. Graddy provides no details about his plans for Gamarra. Sealed App'x 74. He identifies no specific starting dose, nor does he commit to a maximum dosage that Gamarra will receive. All we have to go on is the generic statement in the appendix that Butner provides in every *Sell* case, noting that Butner prefers to treat patients with the "minimum effective dose" and "commonly" adopts certain "target dose[s]." Sealed App'x 60, 67. Dr. Graddy testified that he would monitor Gamarra and adjust his medication "immediately" in response to any side effects. 4/20/18 Hr'g Tr. at 41. He also claimed that he would "immediately" act to mitigate any side effects, perhaps by using beta blockers. *Id.* at 42, 46.

Faced with plans sketched at that level of generality, it is difficult to see how a court could make the medically informed determinations that the second and fourth *Sell* factors demand. How, for example, would Dr. Graddy modulate his treatment "immediately" if he has administered a long-acting form of risperidone that lasts several weeks? Indeed, other courts have been able to reach those conclusions only by reviewing detailed, recommended treatment plans medical personnel proffer for specific patients, and probing them with the aid of academic studies and medical testimony. *See, e.g.*, *Onuoha*, 820 F.3d at 1057-60; *United States v. Watson*, 793 F.3d 416, 424-27 (4th Cir. 2015); *Grigsby*, 712 F.3d at 975-76; *United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005). It is unclear why the government did not provide a specific treatment plan here and how, without one, a district court can be expected to engage in the "sensitive balancing" that *Sell* contemplates. *Dillon*, 738 F.3d at 296.

Second, the government must demonstrate by clear and convincing evidence that the particular drug recommended is medically appropriate. As noted, *Sell* itself provides that the "specific kinds of drugs at issue" are a relevant consideration under this factor. *Sell*, 539 U.S. at 181. In this case, Dr. Graddy said that he would pursue a course of risperidone because Gamarra has responded well to it in the past. But Gamarra's medical records reveal an incident where he blacked out and was hospitalized after ingesting risperidone, with treating staff recording an unhealthily low blood pressure level. And Gamarra has consistently articulated an aversion to that particular drug. To be sure, his aversion was irrationally expressed. He said that he "died two times on Risperdal," Sealed App'x at 8, and asserted that "risperidone" means "to overthrow the government," *id.* at 11. But even an aversion entangled in delusional beliefs would seem to bear on a patient's level of compliance with the proposed medication regimen, as well as the likelihood that its administration will be unnecessarily traumatic for him.

Indeed, Dr. Graddy's own report suggests no reason to administer risperidone rather than another antipsychotic, especially one such as Seroquel that Gamarra actually favored. Dr. Graddy's *Sell* Appendix cites the American Psychiatric Association's Practice Guidelines, which explicitly recommend that a patient's "preference for a particular medication" be taken into account. *Id.* at 52. Gamarra requested Seroquel when he arrived at FMC Butner, and he did at the outset demonstrate some compliance on it. The *Sell* Appendix asserts that the "current professional psychiatric literature indicates most antipsychotics have approximately equal efficacy against psychotic symptoms." *Id.* at 63. And, as applied to Gamarra himself, Dr. Graddy's report stated that "there is information that supports Mr. Gamarra has been

treated with multiple antipsychotics" in the past, "all [of] which had at least some efficacy for his psychotic symptoms." *Id.* at 72 n.3. Perhaps there are good medical reasons for Dr. Graddy's choice of risperidone, but those reasons are not apparent from the record.

Third, a court order granting a *Sell* motion should state meaningful limitations on what drugs and dosages a defendant may receive, and for how long attempts to restore a defendant's competence may continue. Other circuits have required that the "order to involuntarily medicate a non-dangerous defendant solely in order to render him competent to stand trial must specify which medications might be administered and their maximum dosages." *Chavez*, 734 F.3d at 1253; *see also United States v. Breedlove*, 756 F.3d 1036, 1043-44 (7th Cir. 2014); *United States v. Hernandez-Vasquez*, 513 F.3d 908, 916-17 (9th Cir. 2008); *United States v. Bush*, 585 F.3d 806, 817-18 (4th Cir. 2009); *Evans*, 404 F.3d at 240-42. By statute, once it has been determined that "there is a substantial probability that in the foreseeable future" a defendant may be rendered competent, the defendant may be detained only for "the time period specified." 18 U.S.C. § 4241(d)(1), (d)(2). Here, the district court order granting forcible medication required only that the "medical staff at FMC Butner submit a report detailing Gamarra's treatment (including the assessment and management of any side effects), and any further recommendations concerning future treatment within thirty (30) days of the commencement of Gamarra's involuntary medication, and then every thirty (30) days thereafter." J.A. 207. An open-ended order of this kind impermissibly grants the Butner staff "carte blanche" to treat Gamarra as they see fit. *Breedlove*, 756 F.3d at 1044 (quoting *Evans*, 404 F.3d at 241). This is especially so since Dr. Graddy's "proposed individualized treatment plan" broadly authorizes him to "treat

Mr. Gamarra with additional medications, under Court order, along a logical and reasonable clinical course, in compliance with BOP policies and longstanding *Sell* practice at FMC Butner." Sealed App'x 74. It is thus worth stressing that our judgment here does not prevent the district court from seeking any further information it may need as Gamarra's treatment proceeds to ensure that the treatment is carried out in a manner that is medically appropriate under *Sell*, and time-limited as required by section 4241(d)(2).

Courts cannot and need not micromanage the medication decisions of medical professionals. *Cf. Onuoha*, 820 F.3d at 1059; *Hernandez-Vasquez*, 513 F.3d at 917. The medical decisions can be made only by experts. But where the government seeks to medicate a defendant in order to prosecute him, it must persuade the court that the medical decisions are appropriate. In this context, it is not too much to ask that doctors propose, and district courts set, basic boundaries on permissible treatment, including the drug(s) to be administered, the maximum dosage, and the contemplated timeframe for treatment. Although Gamarra does not raise these considerations, other circuits have required such specificity for *Sell* orders within their jurisdiction, and I see no reason why we would not follow suit.

* * *

In light of the serious liberty interest at stake in the forcible administration of psychotropic medication, the government must demonstrate, in each case by clear and convincing evidence, that it retains an important interest in the prosecution, that adequate efforts at voluntary compliance were attempted, and that medical staff have provided the court with a treatment plan with enough specificity to guide the court's *Sell* analysis.

In turn, the court must guarantee that an appropriate drug has been prescribed and specify limits on what treatment the patient may receive and for how long. Because Gamarra does not raise these considerations on appeal, and in respect for the district court's superior vantage point, I join the opinion of the court. But I do so uneasily. I would not in future be inclined to rest on a trial-incompetent defendant's forfeiture of arguments to relieve the government of its burden to establish each of the *Sell* factors by clear and convincing evidence.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JEAN-PAUL GAMARRA, Defendant.

Criminal No. 17-65 (JDB)

MEMORANDUM OPINION

The government moves to involuntarily medicate defendant Jean-Paul Gamarra, who suffers from mental illness, to render him competent to stand trial. Pursuant to Sell v. United States, the Court must determine whether "in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, [the government has] shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it." 539 U.S. 166, 183 (2003). Upon consideration of the pleadings, the testimony presented at the Sell hearing before Magistrate Judge Deborah A. Robinson held on April 13, 18, and 20, 2018,[1] and the entire record herein, the Court will grant the government's motion.[2]

[1] See Tr. of Sell Hr'g, Apr. 13, 2018 ("4/13/18 Hr'g Tr.") [ECF No. 18]; Tr. of Sell Hr'g, Apr. 18, 2018 ("4/18/18 Hr'g Tr.") [ECF No. 24]; Tr. of Sell Hr'g, Apr. 20, 2018 ("4/20/18 Hr'g Tr.") [ECF No. 21].

[2] At the status conference held on October 17, 2018, counsel for both parties stated that they had no objection to this Court deciding this motion based upon the record, including the transcripts of the Sell hearing.

BACKGROUND[3]

Gamarra was arrested outside the White House on March 28, 2017, after approaching United States Secret Service Officers with a package that he claimed contained a detonator for a nuclear device. Gamarra, 308 F. Supp. 3d at 231. He was indicted for threatening the President in violation of 18 U.S.C. § 871 and threatening and conveying false information concerning the use of an explosive device in violation of 18 U.S.C. § 844(e). Id. at 232. The government represents that Gamarra's "threatening conduct caused a significant area of the District [of Columbia] to be closed to traffic and commerce for approximately an hour and forty minutes." Gov't's Mot. to Medicate Involuntarily Def. to Restore Competency [ECF No. 22] ("Gov't's Mot.") at 6. Gamarra was found to have a mental disease that rendered him incompetent to stand trial, and he was hospitalized at Federal Medical Center ("FMC") Butner for further evaluation pursuant to 18 U.S.C. § 4241(d). Gamarra, 308 F. Supp. 3d at 232.[4]

At FMC Butner, forensic psychologist Evan S. Du Bois, Psy.D., and predoctoral psychology intern Kelsey L. Laxton completed a forensic evaluation, ultimately concluding that Gamarra remained "not competent to proceed to trial" but that "his competency is likely to be restored with adherence to a medication regimen." Gov't's Ex. 2 ("Forensic Evaluation") at 14.[5] FMC Butner Staff Psychiatrist Dr. Logan Graddy provided a forensic addendum and treatment plan that similarly concluded that administration of antipsychotic medication was medically appropriate, that other interventions were unlikely to be beneficial without medication, and that

[3] The Court incorporates by reference fuller recitations of the factual and procedural history of this case in its prior opinions. See United States v. Gamarra, 308 F. Supp. 3d 230, 231–33 (D.D.C. 2018); United States v. Gamarra, Crim. No. 17-65, 2018 WL 4954128, at *1–3 (D.D.C. Oct. 12, 2018).

[4] Section 4241(d) permits a defendant to be hospitalized for up to four months, but Gamarra ultimately spent more than six months at FMC Butner. Id. This Court held that his extended hospitalization violated the statute but that this did not justify dismissal of the charges against him. Id. at 233–34.

[5] All cited exhibits were admitted without objection during Sell proceedings before Magistrate Judge Robinson. See Apr. 13, 2018 Min. Entry (admitting Gov't Exs. 1–3, 11); Apr. 18, 2018 Min. Entry (admitting Gov't Exs. 10, 10A); Apr. 20, 2018 Min. Entry (admitting Gov't Exs. 4, 12).

the benefits of medication would outweigh the risks. Gov't's Ex. 11 ("Forensic Add. and Treatment Plan") at 1, 3.

The government orally moved to have defendant involuntarily medicated, and the defendant opposed the motion. Magistrate Judge Robinson held a Sell hearing over three days in April 2018 at which Dr. Du Bois, Laxton, and Dr. Graddy testified for the government. The defendant did not present any witnesses.

Dr. Du Bois, whom the court qualified as an expert in clinical forensic psychology, testified that, in his opinion and to a degree of professional certainty, Gamarra suffers from "schizophrenia, continuous," based on observations of delusional ideation, disorganized speech, and possible auditory hallucinations. 4/13/18 Hr'g Tr. at 55:9–11; 58:3–10. Dr. Du Bois opined that Gamarra was not competent to stand trial because, although Gamarra exhibited a basic factual understanding of court proceedings in general, his understanding of his case and the charges against him were "rooted in his delusional beliefs, which were a result of his schizophrenia." Id. at 64:1–23. Dr. Du Bois further opined that Gamarra would have difficulty testifying because he "would have difficulty communicating clearly and organizing his thoughts and testimony" and because his mental illness made it possible he would incriminate himself. Id. at 64:24–65:14. Dr. Du Bois concluded that Gamarra's disorganized speech would also impair his ability to consult with counsel. Id. at 65:15–25.

Dr. Du Bois testified that he did not recommend individual therapy in place of antipsychotic medication because delusional beliefs, like those to which Gamarra ascribed, "often don't respond to behavioral or therapy techniques." Id. at 94:24–95:11. He and Laxton "attempted to challenge some of [Gamarra's delusional] beliefs or introduce evidence that would oppose them,

which is the recommended method for opposing or trying to change delusional beliefs, . . . [but this course of treatment was] not effective." Id. at 95:12–17.

Laxton, who was qualified as an expert in clinical forensic psychology without objection,[6] testified that, in her opinion and based on a reasonable degree of professional certainty, Gamarra suffers from "schizophrenia, continuous," and was not competent to stand trial. Id. at 13:10–15, 18:8–19, 20:12–18. In particular, Laxton testified that while Gamarra had a factual understanding of the court proceedings, including an understanding of basic legal terminology and concepts, he had "some difficulty rationally understanding the proceedings against him, especially the potential consequences of his case." Id. at 21:6–22. She explained that Gamarra's understanding of the charges against him and his defenses to those charges were themselves rooted within his delusional belief system. Id. at 22:23–23:10. As a consequence, she opined that Gamarra lacked capacity to testify because his condition made it difficult for him to communicate "in a clear and coherent way . . . without discussing further his delusional belief systems" and because he would "likely . . . incriminate himself without realizing that he was doing so." Id. at 23:14–24:8. For essentially the same reasons, Laxton concluded that Gamarra also lacked capacity to consult with counsel. Id. at 24:9–19. In addition, Laxton noted that Gamarra's delusional beliefs around electric waves, computers, and telephones would affect his competency to stand trial; for example, "in the courtroom, he thought that the presence of the telephone would be detrimental to him or his case or even have some physical impact on [the] judge . . . ." Id. at 22:6–22.

Laxton also testified that, in her opinion, administration of antipsychotic medication was a "key piece" of Gamarra's treatment plan that would be "necessary to get [Gamarra's] symptoms

[6] The magistrate judge received Laxton, who served as an intern under Dr. Du Bois, as an expert "with the understanding that the licensed clinical psychologist who approved the report will also be a witness in this proceeding." Id. at 13:13–15.

in control to a point that he would be competent to stand trial," and it was "unlikely" that Gamarra's condition would improve without medication. Id. at 37:10–38:9. Though staff had "encouraged Mr. Gamarra to take medications," Laxton explained that Gamarra refused to take antipsychotic medications at various times while at Butner because of his beliefs that "he had . . . died previously taking another medication," "that he does not have a mental illness and does not need those medications," and that his religion prohibited taking what he believed were addictive medications. Id. at 26:21–27:10; 37:20. Ms. Laxton observed, however, that during her examination Gamarra communicated more clearly on medication and that this improvement was corroborated by reports from Gamarra's family (and Gamarra himself) that antipsychotic medication improved Gamarra's condition. Id. at 27:23–28:18. Gamarra's family members reported that he was "highly intelligent and functioned well when he [had] complied with medications" in the past. Id. at 28:4–8. Laxton herself observed that Gamarra "communicated slightly better" during the brief periods at FMC Butner when he was "more compliant with [prescribed antipsychotic] medication." Id. at 28:16–18.

Dr. Graddy, whom the court qualified as an expert in the field of forensic psychiatry, testified that, in his opinion and based on a reasonable degree of medical certainty, Gamarra suffers from "schizophrenia, multiple episodes, currently in[an]active episode." Id. at 112:2–11; 114:8–15. Dr. Graddy did not meet Gamarra in person, but he "reviewed the full record" before making his diagnosis. Id. at 114:8–115:10. His diagnosis, in contrast to Dr. Du Bois and Laxton's diagnosis of "schizophrenia, continuous," was based on his observation that "Gamarra has gotten better in the past on medications, significantly better, such that I have classified him as having multiple distinct episodes rather than one continuous episode." Id. at 115:19–25.[7]

[7] Dr. Samantha DiMisa diagnosed Gamarra with schizoaffective disorder, a related but distinct condition, during his time at the Metropolitan Correctional Center ("MCC") in New York, New York. Forensic Add. and

Dr. Graddy noted several studies indicating that antipsychotic medications restored competency in more than seventy-five percent of defendants suffering from schizophrenia and other psychotic disorders. Of particular relevance, Dr. Graddy cited a 2012 study in which 62 of 81 defendants diagnosed with schizophrenia were restored to competency with antipsychotic medications, for a restoration rate of approximately 76%. See 4/18/18 Hr'g Tr. at 40:20–41:18 (discussing Gov't's Ex. 10 at 3). Although Dr. Graddy did not directly evaluate Gamarra's competency, Dr. Graddy noted that Gamarra "appears . . . to be consistent with other . . . defendants who did regain their competency when treated with antipsychotic medication" and that this conclusion was "stronger" because Gamarra "has documented improvement on antipsychotic medication in the past." 4/13/18 Hr'g Tr. at 116:1–11. Dr. Graddy testified that antipsychotic medications "are generally safe and effective" and that "patients with schizophrenia or schizoaffective disorder . . . need medications to improve" because "[o]ther treatments are not very effective for these conditions." Id. at 118:11–24. Dr. Graddy did not believe that other, less-invasive treatments would be effective. Id. at 121:10–13; 143:4–8. Dr. Graddy stated that he would propose beginning Gamarra's treatment with the antipsychotic medication risperidone because it "is a medicine he took in the past" that he "appeared to tolerate . . . well" and that had been documented to "improv[e] . . . his mental state." Id. at 123:15–18.

In addition, Dr. Graddy opined that medication would be "medically appropriate," particularly since "he appears . . . to be a patient who does get better with treatment." Id. at 120:11–19. Dr. Graddy explained that antipsychotic medication is the course of treatment he would recommend to Gamarra "if he were to come and see me with this complaint in the community" or

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Treatment Plan at 2 n.2. Dr. Graddy's report explained that "this diagnosis and the treatment required for it are not significantly different from [his] diagnosis" of schizophrenia. Id. Furthermore, Dr. Graddy noted that the "diagnostic difference" between his conclusion that Gamarra suffered from schizophrenia, multiple episodes, currently in active episode, and Dr. Du Bois's diagnosis of schizophrenia, continuous, "is minor." Id.

"[i]f his family were to approach me" seeking advice on treatment. Id. at 122:11–23. He also noted that antipsychotic medications were prescribed to Gamarra "every time he's gone into the hospital." Id. Dr. Graddy also highlighted that he considered risperidone "one of our best medications" for treating patients with schizophrenia-type diagnoses, even in light of the potential risk of side effects. 4/20/18 Hr'g Tr. at 43:1–12.

As to potential side effects, Dr. Graddy testified that antipsychotic medications are known to have a significant risk of serious side effects, including acute dystonic reactions (involuntary muscle contractions), parkinsonism (characterized by muscle rigidity, tremors, and decreased spontaneous facial expressions), dyskinesias (characterized by involuntary grimacing, tongue movements, rapid blinking, and rapid limb movement), and akathisia (uncomfortable inner restlessness). 4/18/18 Hr'g Tr. 22:15–24:6; 31:22–32:16; 38:6–40:19. Dr. Graddy testified that various studies suggested that the reaction rates for antipsychotic medications generally ranged from two to ten percent for dystonic reactions, up to fifty percent for parkinsonism, up to thirty-two percent for dyskinesias, and up to thirty percent for akathisia. Id. at 24:23–25:1; 33:7–25; 39:3–9; 40:6–11.

He opined, however, that if Gamarra were medicated, any side effects that Gamarra might experience would be closely monitored and managed by medical staff, either by adjusting the dosage of antipsychotic medication, prescribing a different antipsychotic medication, or by treating the side effects with other medications. 4/13/18 Hr'g Tr. at 122:24–123:25. Dr. Graddy acknowledged that Gamarra's medical records noted that he had "complained of some neuromuscular symptoms," particularly "stiffness," in response to risperidone, which a treating physician would "watch closely if we have to treat him with that" medication. 4/20/18 Hr'g Tr. at 36:19–37:3. But because negative reactions tend to "occur early in treatment" and would be noted

by medical providers, Dr. Graddy believed the risk of Gamarra experiencing, for example, a dystonic reaction while taking risperidone to be "fairly low since he's tolerated [this] medicine in the past." Id. at 25:12–16; 28:2–4; 4/20/18 Hr'g Tr. at 36:7–13; see also 4/20/18 Hr'g Tr. 19:22–20:2 (Dr. Graddy explaining his use of past medical records in recommending medication to patients). Furthermore, any side effects from the medication would be "very unlikely to cause him to not be able to be competent" to stand trial. 4/13/18 Hr'g Tr. at 120:20–7. In all, despite the risks of side effects, Dr. Graddy stated that "from a medical perspective, benefits of treatment, in my opinion, outweigh the risks." Id. at 120:16–19.

DISCUSSION

"Although an individual has a constitutionally protected interest in avoiding involuntary medication, that interest can be overcome by an 'essential' or 'overriding' state interest in some circumstances." United States v. Dillon, 943 F. Supp. 2d 30, 34 (D.D.C. 2013), aff'd, 738 F.3d 284 (D.C. Cir. 2013) (quoting Sell, 539 U.S. at 179–80). The Supreme Court in Sell "prescribed a detailed, four-part inquiry for district courts to undertake prior to authorizing involuntary medication to restore defendants to competency." United States v. Dillon, 738 F.3d 284, 290 (D.C. Cir. 2013). Pursuant to Sell,

> a court may order the administration of medication to render a mentally ill defendant competent to stand trial on criminal charges if:
> (1) doing so advances an important government interest, such as bringing to trial an individual accused of a serious crime;
> (2) the medication is substantially likely to render defendant competent to stand trial[] and substantially unlikely to have side effects that will interfere significantly with defendant's ability to assist counsel in conducting a trial defense;
> (3) alternative less intrusive treatments are unlikely to achieve substantially the same result; and
> (4) administration of the medication is medically appropriate, i.e., in the patient's best interest in light of his medical condition.

Dillon, 943 F. Supp. 2d at 34–35 (citing Sell, 539 U.S. at 180–82). The government must prove each Sell factor by clear and convincing evidence. Dillon, 738 F.3d at 291–92.[8]

I. IMPORTANT GOVERNMENT INTEREST

The first Sell factor requires a court to "find that important government interests are at stake." Sell, 539 U.S. at 180. "The [g]overnment's interest in bringing to trial an individual accused of a serious crime is important," but courts "must consider the facts of the individual case," as "[s]pecial circumstances may lessen the importance of that interest." Id. In particular, "the defendant already having been confined for a significant period of time" may "undermine the importance of the government's interest in prosecution." Dillon, 943 F. Supp. 2d at 35. Furthermore, the possibility that a defendant might face "lengthy confinement in an institution for the mentally ill" notwithstanding his inability to stand trial can "diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." Sell, 539 U.S. at 180.

The government asserts that important governmental interests are at stake in this case because it seeks to bring Gamarra to trial on charges of serious offenses. The crimes with which he is charged involve threats to health and safety, and "the government has a significant interest in bringing . . . to justice" defendants charged with "[a]ny threat on a governmental official, particularly the President." Gov't's Mot. at 6. Furthermore, "[f]ailure to bring such offenders to

[8] As a threshold inquiry, the Supreme Court in Sell directed that a court should consider whether forced medication might be warranted on dangerousness grounds—that is, due to the danger defendant poses to himself or others—before determining whether involuntary medication to restore competency is appropriate. Sell, 539 U.S. at 182–83 (discussing involuntary medication criteria under Washington v. Harper, 494 U.S. 210, 225–26 (1990)). Neither party contends that Gamarra would qualify for forced medication under Harper. Furthermore, Dr. Graddy's report concluded that Gamarra would not "meet criteria under BOP policy" for forced medication under Harper because "Gamarra was able to function adequately in the Mental Health Department [at FMC Butner] without engaging in behavior that posed a risk of being dangerous to himself or others." Forensic Add. & Treatment Plan at 1–2. Accordingly, this court will proceed past this threshold inquiry to analysis of the Sell factors.

justice has the potential to substantially undermine or interfere with the orderly process of government and thereby have a negative impact on the community as a whole." Id.

The D.C. Circuit has not yet "wade[d] into the debate among [its] sister circuits about whether the seriousness of a crime is measured by the statutory maximum or the likely guideline sentence, or both," Dillon, 738 F.3d at 292, so this Court will examine both the statutory maximum and the likely Guidelines sentence.[9] If convicted, the government estimates that Gamarra would face a recommended sentencing range of twenty-one to twenty-seven months' imprisonment, based upon a Base Offense Level of 12 under U.S. Sentencing Guideline § 2A6.1 and a four-level increase under § 2A6.1(b)(4)(A) because the offense allegedly resulted in "substantial disruption of public, governmental, or business functions or services." U.S. Sentencing Guidelines Manual § 2A6.1 (U.S. Sentencing Comm'n 2016) ("U.S.S.G"); Gov't's Mot. at 7.[10] The Court also notes that all criminal offenses with a total offense level of sixteen fall within Zone D of the U.S.

[9] Circuit courts have applied the first Sell factor differently. Most circuits seek "objective parameters by which to assess seriousness," including consideration of "the potential statutory penalty and/or Guideline range of imprisonment which may be imposed." United States v. Green, 532 F.3d 538, 547 (6th Cir. 2008). Some circuits look primarily to statutory maximums and minimums, see id. at 549; United States v. Evans, 404 F.3d 227, 237–38 (4th Cir. 2005), while other courts consider both statutory maximum sentences and likely sentencing ranges under the Guidelines, see United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007).

Furthermore, because the Supreme Court noted in Sell that under the first factor a court must "consider the facts of the individual case in evaluating the Government's interest in prosecution," 539 U.S. at 180, the Eleventh Circuit has applied a circumstance-specific approach to determine whether a crime is "serious." See, e.g., United States v. Fuller, 581 F. App'x 835, 836 (11th Cir. 2014) (per curiam) (noting no need to "decide whether the charged offense here . . . is, as a general matter, a serious crime" because "the facts of the instant case" were sufficiently alarming to conclude the defendant's alleged conduct was "serious"). The Ninth Circuit follows a blended approach, starting with the likely Guidelines range and then considering "the specific facts of the alleged crime as well as the defendant's criminal history." Onuoha, 820 F.3d at 1055.

Though the D.C. Circuit has not yet weighed in, Dillon, 738 F.3d at 292, the Court notes that the articulated standard implies that a court should first examine objective criteria of the crime's seriousness (such as the statutory maximum and Guidelines range), and then it should evaluate the facts of the individual case in its "special circumstances" analysis, see id. (stating that "[a] court must first determine whether the charged crime is 'serious'" before moving on to a consideration of whether special circumstances apply based on "the specific facts of the case before it"). Accordingly, the Court will follow this approach here.

[10] Because the Guidelines provide that defendants with a total offense level of sixteen be imprisoned for twenty-one to twenty-seven-months only if the defendant has a criminal history category of I, the Court presumes that the government also represents that Gamarra would likely be assigned a criminal history category of I. See U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

Sentencing Guidelines Sentencing Table regardless of an offender's criminal history category, which reflects the Sentencing Commission's judgment that these offenses are of a type that always require that a term of imprisonment be imposed—rather than, for example, probation or home confinement. See U.S.S.G. Ch. 5, Pt. A; U.S.S.G. §§ 5B1.1, 5C1.1. Finally, each offense carries a significant maximum penalty that reflects "legislative judgments concerning the severity of the crime." Gov't's Reply to Def.'s Opp'n [ECF No. 26] ("Gov't's Reply") at 2–3 (citing Evans, 404 F.3d at 237–38)). As the government notes in its brief, threatening the President, 18 U.S.C. § 871, and threatening the use of an explosive device, 18 U.S.C. § 844(e), carry maximum terms of imprisonment of five and ten years, respectively. Gov't's Mot. at 7.

Here, the Court concludes that both 18 U.S.C. §§ 871 and 844(e) may qualify as "serious crimes" for purposes of the Sell analysis. This Court has previously found that making threats against the President in violation of 18 U.S.C § 871 is a "serious crime," Dillon, 943 F. Supp. 2d at 35–36; see also United States v. Aleksov, Crim. No. 1:08-57, 2009 WL 1259080 (D.D.C. May 7, 2009), at *2, and other federal courts have determined that threatening the use of explosives in violation of 18 U.S.C. § 844(e) is similarly "serious," United States v. Onuoha, 820 F.3d 1049, 1054–56 (9th Cir. 2016) (describing alleged violation of 18 U.S.C. § 844(e) as "sufficiently serious" but vacating order to involuntarily medicate on other grounds); United States v. Milliken, Crim. No. 3:05-6-J-32, 2006 WL 2945957 (M.D. Fla. July 12, 2006) (finding alleged violations of 18 U.S.C. § 844(e) to be "no doubt serious"). The fact that these crimes repeatedly have been found to be "serious," alongside consideration of the maximum sentences that may be imposed and the sentence likely to be imposed under the Guidelines, persuades the Court that both crimes generally qualify as "serious crimes" for purposes of its Sell analysis.

Gamarra does not dispute that he faces charges for "serious crimes." He argues, rather, that two "special circumstances" nevertheless sufficiently mitigate the government's interest in prosecution. Def.'s Opp'n to Gov't's Mot. ("Def.'s Opp'n") [ECF No. 25] at 7.

Gamarra first argues that his lengthy pre-trial detention negates the government's interest in his continued prosecution. See id. at 7–9. As noted above, Gamarra has been in federal custody for almost nineteen months, since March 2017, and the government estimates that defendant would face a Guidelines range of twenty-one to twenty-seven months' imprisonment if convicted, see Gov't's Mot. at 7. Therefore, Gamarra's potential term of imprisonment under the Guidelines—without accounting for the possibility of good-time credit—would end between December 2018 and June 2019. Gamarra notes that "at least three or four months of continuous treatment" with antipsychotic medication is anticipated to be required before his competency is likely to be restored. Def.'s Opp'n at 8 (quoting Gov't's Ex. 10 at 9). Gamarra also stated his intention to appeal an order granting the government's motion, which would add additional time to Gamarra's stay in federal custody. Id. at 7–8. In all, Gamarra estimates that thirty-four months—seven months longer than the upper end of a sentence imposed under the Guidelines—could pass between his arrest and the beginning of trial if the Court grants the government's motion. Id. at 8.

On this point, the government argues that a lengthy term of pre-trial detention, caused in part by Gamarra's decisions not "to take prescribed medication" and, if the government is successful in this motion, to "pursue[] his appellate rights," does not "negate the government interest." Gov't's Reply at 1–2. Further, the government cites cases in which long terms of pretrial detention did not preclude a court from finding that the important-governmental-interest prong of the Sell test had been met. See id.[11]

[11] For example, in Aleksov, sixteen months' detention did not preclude finding an important government interest when the estimated sentencing range was ten to thirty-three months. 2009 WL 1259080, at *2. In Dillon, the

The Court is attentive to the fact that Gamarra has now been detained for over eighteen months and that, if convicted, has therefore already served a significant portion of the recommended Guidelines sentence of twenty-one to twenty-seven months' incarceration. The length of Gamarra's pre-trial detention certainly lessens to some extent the government's interest in prosecuting him because even if convicted Gamarra would likely have already served a significant portion—or the entirety—of any sentence to be imposed.

However, the government's interest in prosecuting serious crimes is not limited to punishing an individual offender with a term of imprisonment. See United States v. Claflin, 670 F. App'x 372, 373 (5th Cir. 2016) (per curiam) ("Even if it were determined that Claflin had already served his likely sentence, such a circumstance does not defeat the Government's interest in prosecuting him."); United States v. Springs, 687 F. App'x 672, 674 (9th Cir. 2017) (affirming involuntary medication order of defendant facing twenty-one to twenty-seven month sentence who had "already been in custody for nearly three years").

As articulated by the Ninth Circuit, "there is an important distinction between incarceration itself[] and the significance for society of gaining a criminal conviction for a defendant's violation of the law." Onuoha, 820 F.3d at 1056. This principle is especially relevant in cases involving threats against public officers; as the government explains, "[a]ny threat on a government official" has the potential to undermine "the orderly process of government" more broadly. Gov't's Mot. at 6; see also United States v. Pfeifer, 661 F. App'x 618, 619 (11th Cir.

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possibility of twenty-four months' detention did not preclude finding an important government interest when the estimated sentencing range was fifty-one to sixty months. 943 F. Supp. 2d at 35. In United States v. Bush, 585 F.3d 806 (4th Cir. 2009), the Fourth Circuit affirmed the district court's finding of an important government interest when the estimated sentencing range was twenty-four to thirty months and defendant had been held for eighteen months in pretrial custody and more than twelve months in home confinement. Id. at 815. And in United States v. Austin, 606 F. Supp. 2d 149 (D.D.C. 2009), the Court concluded that twenty-seven months' detention when a defendant faced a maximum sentence of forty-one months "certainly diminished" but still had not "eradicated" the government's interest. Id. at 151–152.

2016) (per curiam) (noting that "the Government's interest in prosecuting [the defendant for alleged violation of 18 U.S.C. § 871] is not only for protection of the president but to uphold the integrity of our system of government"). In addition, deterrence—both general and specific—forms an important part of the government's interest. Here, the government points out that Gamarra allegedly has demonstrated other "bizarre behavior in relation to public figures" in the past and thus that "the government has a significant interest in . . . limit[ing] his likelihood to reoffend." See id. at 6 & n.3. And a sentence is not limited to a term of imprisonment. As the Fourth Circuit noted in Bush, even when a defendant is convicted and released on a sentence of time served, the court may impose conditions of supervised release to "ensure that [the defendant] is not released into the public without appropriate monitoring." 585 F.3d at 815; see also Onuoha, 820 F.3d at 1056 (noting that "a sentence might also include a period of supervised release, which would help ensure that [defendant] does not return to making threats when released into the public" even when the defendant would "conceivably be sentenced to time served" (quotation omitted)). Finally, criminal convictions have other long-lasting consequences. For example, conviction on the instant offense could factor into Gamarra's criminal history score were he to commit an offense in the future. See U.S.S.G. § 4A1.1.

Although Gamarra's lengthy term of pre-trial detention weighs against a finding of an important government interest, these other considerations form a hefty counterbalance. Notwithstanding the length of his pre-trial detention, the government interest here is still strong because of the seriousness of the charged offenses, the role that prosecution of the offense would play in deterring Gamarra and others from committing such an offense, and the concomitant effects that follow a conviction, including the possibility that a term of supervised release may be imposed.

Accordingly, this Court concludes that the duration of his pre-trial detention alone will not negate the government's important interest in prosecuting this case.

Gamarra also argues that the government's interest in prosecuting him is mitigated by the likelihood that he will be civilly committed pursuant to 18 U.S.C. § 4246 if the government's motion to involuntarily medicate him is denied and he cannot proceed to trial. Def.'s Opp'n at 9–10. The government counters that "[t]here has been no finding, or proffer of evidence, that the characteristics of the defendant would lead to civil commitment in this case," Gov't's Reply at 4, and in any event, "the potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution," id. (quoting Sell, 539 U.S. at 180). The Court agrees with the government on this issue, as the Court has not been presented with any evidence regarding whether Gamarra would be likely to face civil commitment under 18 U.S.C. § 4246 (or any other statute) if he cannot stand trial. See Ohuoha, 820 F.3d at 1057 (not weighing the possibility of civil commitment against the government's interest where "[n]othing in the record indicates that [defendant] is a candidate for civil commitment").

In sum, the Court finds that the government has proven by clear and convincing evidence that—notwithstanding the length of Gamarra's pretrial detention in relation to his likely sentence—it has an important interest in prosecuting Gamarra because the alleged crimes are serious and special circumstances do not diminish the importance of the government's interest in prosecuting those crimes.

II. INVOLUNTARY MEDICATION WILL SIGNIFICANTLY FURTHER THAT INTEREST

"Second, the court must conclude that involuntary medication will significantly further those concomitant state interests." Sell, 539 U.S. at 181. In other words, involuntary medication must be "substantially likely to render the defendant competent to stand trial" but also

"substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." Id.

The government argues that involuntary medication significantly furthers its interest in prosecuting Gamarra because medication is substantially likely to render Gamarra competent and unlikely to cause side effects that would impair his ability to participate in his defense. In particular, the government points to Dr. Graddy's testimony that Gamarra's "prior history of [successful] medication treatment" suggests that antipsychotic medication will render him competent and that his individual characteristics were "consistent with other Sell defendants who did regain their competency under antipsychotic medication." Gov't's Mot. at 12–13. The government also cited Dr. Graddy's opinion that antipsychotic medications were unlikely to cause side effects that would render Gamarra incompetent. Id. at 14.

In response, Gamarra seeks to cast doubt on Dr. Graddy's opinion, noting that Dr. Graddy did not examine Gamarra in person and that the data on which he based his opinions involved defendants diagnosed with several different psychiatric disorders and generalizations about the effects of antipsychotic medications as a class. Gamarra states that Dr. Graddy did not provide "the Court with any evidence concerning the restoration rate for defendants diagnosed [specifically] with schizophrenia who were treated specifically with [r]isperidone." Def.'s Opp'n at 12. In other words, Gamarra contends that the government should have cited a study of competency-restoration rates for defendants with schizophrenia treated with risperidone, not simply for defendants with schizophrenia treated with antipsychotic medications similar to and including risperidone. Similarly, Gamarra contends that the record does not include sufficient evidence "relating to the potential side effects of [r]isperidone administered to defendants

diagnosed with schizophrenia in Sell proceedings," as opposed to defendants with schizophrenia or other psychotic disorders. Id. at 13.

Although data on restoration rates and side effects from studies specifically examining defendants diagnosed with schizophrenia and prescribed risperidone would certainly be helpful to the Court, Dr. Graddy's failure to provide a study of such a narrowly tailored epidemiologic population does not prevent the government from carrying its burden of proof as to the second Sell factor. Here, the government has not only provided strong evidence that defendants suffering from schizophrenia are likely to have their competency restored from treatment with a class of antipsychotic medications that includes risperidone, but also that Gamarra in particular is likely to have his competency restored because his condition has responded favorably in the past to treatment with risperidone. Gamarra has provided no evidence to the contrary. Furthermore, while the testimony makes clear that antipsychotic medications pose a significant risk of serious side effects, the testimony also leads the Court to conclude that these side effects can be monitored and managed, Gamarra may be less likely to experience some of these side effects because of his treatment history and ability to tolerate these medications in the past, and any such side effects are unlikely to negatively impact his competency. Hence, the Court concludes that the government has proven by clear and convincing evidence that involuntary medication will significantly further the government's interest.

III. INVOLUNTARY MEDICATION IS NECESSARY

"Third, the court must conclude that involuntary medication is necessary to further those interests" and that "any alternative, less intrusive treatments are unlikely to achieve substantially the same results." Sell, 539 U.S. at 181.

The government supports its contention that involuntary medication is necessary by citing testimony from its experts stating that antipsychotic medication is likely to restore competency and that other treatments are unlikely to be effective. In particular, it references Dr. Du Bois and Laxton's efforts to challenge Gamarra's delusional beliefs and their conclusion that these techniques "were not effective." Gov't's Mot. at 15. The government also cites Dr. Graddy's opinion from both his testimony and the appendix to his report that there is generally no "viable" or "effective" treatment for schizophrenia other than antipsychotic medication. Id. at 15–16. As to Gamarra's individual case, Dr. Graddy opined that "Gamarra has a mental condition that responds to medication." Id. at 16. For these reasons, the government argues that "[a]t this stage, no reasonable option exists other than to medicate the defendant." Id.

In his opposition, Gamarra notes that the government "produced no evidence that the Bureau of Prisons made any attempt to restore Mr. Gamarra's competency other than by medication." Def.'s Opp'n at 14. Gamarra cites several instances in which the government's witnesses explained that other treatments, including therapy, were not recommended for Gamarra. See id. at 15–16.

The Court finds persuasive the detailed expert testimony from Dr. Du Bois, Laxton, and Dr. Graddy indicating that antipsychotic medication is likely to restore Gamarra's competency and that other less-intrusive treatments are not likely to work. And Gamarra failed to provide evidence either to rebut the government's evidence that medication was likely to be effective or to suggest that other treatments could be effective. For example, he does not challenge Dr. Du Bois and Laxton's observation that Gamarra's delusional beliefs persisted after attempts to challenge them and their conclusion that individual therapy was therefore unlikely to be effective. Indeed, all

evidence before this Court supports the government's position that antipsychotic medication is the only treatment likely to restore Gamarra to competency.

Accordingly, the Court finds that the government has met its burden to prove by clear and convincing evidence that involuntary medication is necessary to further its important interest in prosecuting Gamarra.

IV. INVOLUNTARY MEDICATION IS MEDICALLY APPROPRIATE

The fourth and final factor requires courts to find that "administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition." Sell, 539 U.S. at 181. The Supreme Court noted in Sell that "[t]he specific kinds of drugs at issue may matter here as elsewhere," since "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." Id.

As to this final inquiry, the government cites Dr. Graddy's opinion that administration of antipsychotic medication was "clearly medically appropriate" in light of the fact that it is the course of treatment Dr. Graddy would recommend to someone in the community with the same condition as Gamarra and that such treatment has been prescribed "every time [Gamarra has] gone into a hospital." Gov't's Mot. at 16. Gamarra responds by arguing that "[i]n rendering his opinion in this case, . . . Dr. Graddy violated the ethical standards of the American Psychiatric Association" because he did not meet Gamarra in person before forming an opinion. Def.'s Opp'n at 17. Gamarra also challenges Dr. Graddy's opinion by noting that his diagnosis (schizophrenia, multiple episodes, currently in an active episode) differed both from the diagnosis of Dr. Du Bois and Laxton (schizophrenia, continuous) and Dr. Demisa at the Metropolitan Correctional Center during an earlier competency evaluation (schizoaffective disorder, bipolar type, continuous), and stating that this renders his opinion "suspect at best." Id. at 17–18. In its reply, the government

notes that the ethics rule that Gamarra cites applies only to "a psychiatrist opining about matters in the public domain, not to the ordinary practice of psychiatrists working with a practice team" and thus does not apply here. Gov't's Reply at 8 (emphasis removed).

Overall, the Court finds that Dr. Graddy's conclusion that involuntary medication is medically appropriate is persuasive, especially since the record demonstrates that Gamarra has been treated with antipsychotic medications, including risperidone, on several past occasions in a clinical setting and that these medications have significantly improved Gamarra's condition. The Court also finds relevant Dr. Graddy's opinions on the effectiveness of risperidone—both in general and as applied to Gamarra—which led Dr. Graddy to recommend its use notwithstanding the risk of side effects, including the possibility that Gamarra might experience stiffness or other neuromuscular symptoms. See 4/20/18 Hr'g Tr. at 43:1–12 (calling risperidone "one of our best medications"); 4/20/18 Hr'g Tr. at 36:19–41:3 (discussing Gamarra's past history of treatment with risperidone).

In addition, Gamarra's allegation that Dr. Graddy violated an ethical standard of his discipline in forming his opinions is unsupported. As the text of the cited ethics rule makes clear, it applies to occasions when "psychiatrists are asked for an opinion about an individual who is in the light of public attention or who has disclosed information about himself/herself through public media"—not, as here, where a psychiatrist is a patient's treating physician. Am. Psychiatric Ass'n, The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry 9 (2013), available at https://www.psychiatry.org/psychiatrists/practice/ethics. Furthermore, in response to the question of whether it was ethical for a psychiatrist to testify in a competency hearing "based . . . on medical records" where he or she "did not examine the defendant," the American Psychiatric Association's Ethics Committee responded "yes." Am. Psychiatric Ass'n, Opinions of the Ethics

Committee on The Principles of Medical Ethics 35 (2017), available at https://www.psychiatry.org/psychiatrists/practice/ethics. The Committee explained that "[i]t is common for forensic experts to offer opinions" based on review of records and without examining the defendant in person, and the rule was designed instead "to protect public figures from psychiatric speculation that harms the reputation of the profession of psychiatry and of the unsuspecting public figure." Id. Thus, Dr. Graddy's opinion does not violate the ethical standards of his profession.

Furthermore, the Court has no reason to conclude that the variations in Gamarra's diagnosis offered by Dr. Graddy, Dr. Du Bois and Laxton, and Dr. Dimisa alter the conclusion that antipsychotic medication, specifically risperidone, would be medically appropriate in treating Gamarra's condition. Dr. Graddy explained that these diagnoses were "not significantly different" and that any difference was "minor." See Forensic Add. and Treatment Plan at 2 n.2. Gamarra does not explain why these diagnostic differences should lead the Court to reject Dr. Graddy's medical opinion as to the medical appropriateness of treating Gamarra with antipsychotic medication. In any event, Dr. Graddy testified that "patients with schizophrenia or schizoaffective disorder . . . need medications to improve" because "[o]ther treatments are not very effective for these conditions," 4/13/18 Hr'g Tr. at 118:16–24, which suggests that either diagnosis would lead to the same conclusion that administration of antipsychotic medication would be medically appropriate.

Hence, the Court concludes that the government has proven by clear and convincing evidence that treatment with antipsychotic medication is in Gamarra's best interest given his condition, and thus is medically appropriate in this case.

CONCLUSION

For the foregoing reasons, the Court concludes that the government has met its burden of proof with respect to each of the four Sell factors. Accordingly, the Court will order that Gamarra be involuntarily medicated to restore his competency.

/s/

JOHN D. BATES
United States District Judge

Dated: October 19, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JEAN-PAUL GAMARRA, Defendant.	Criminal No. 17-00065 JDB/DAR

REPORT AND RECOMMENDATION

On March 29, 2017, Defendant was charged by criminal complaint with one count of threats against the President, in violation of 18 U.S.C. § 871, and one count of threatening and conveying false information concerning the use of an explosive, in violation of 18 U.S.C. § 844(e). *See* Complaint (ECF No. 1). At his initial appearance on the same date, the Court (Merriweather, J.) ordered a competency screening examination. *See* 03/29/2017 Minute Entry; Order (ECF No. 2).

Defendant first appeared before the undersigned on April 4, 2017 for a status hearing.[1] At that time, for the reasons set forth on the record, the undersigned committed Defendant to the custody of the Attorney General for a period not to exceed 30 days for a determination of competency. *See* 04/04/2017 Minute Entry; Order (ECF No. 5). Following a hearing, and upon consideration of the report of the examiner that Defendant was not competent, the undersigned committed Defendant to the custody of the Attorney General for a period of 120 days for treatment and a determination of whether there is a substantial probability that Defendant will, in the

[1] On the same date, a grand jury returned an indictment. *See* Indictment (ECF No. 6).

foreseeable future, attain the capacity to permit the proceedings to go forward. *See* 07/17/2017 Minute Entry; Order (ECF No. 8).

The evaluation and report were not completed until February 2018. *See* 11/08/2017 Minute Entry; Status Report (ECF No. 10); 01/30/2018 Minute Entry; 03/055/2018 Minute Entry.[2] Defendant, through counsel, asked to be present in this District for hearings regarding the evaluation and report, *see* 03/05/2018 Minute Entry; 03/08/2018 Minute Entry; counsel for the government asked that Defendant be medicated involuntarily, and that a *Sell* hearing be scheduled.[3] *See* 03/08/2018 Minute Entry. The undersigned scheduled the *Sell* hearing for April 9, 2918, *see* 03/08/2018 Minute Entry, and continued the hearing to April 13 on the motion of Defendant. 04/09/2018 Minute Entry; *see also United States v. Gamarra*, 308 F. Supp. 3d 230, 231 (D.D.C. 2018) (finding that Defendant had been hospitalized "well beyond the initial four-month period authorized by the statute," and providing that the undersigned conduct the *Sell* hearing by April 30, 2018).

The *Sell* hearing commenced on April 13, resumed on April 18, and concluded on April 20. *See* 04/13/2018 Minute Entry; 04/18/2018 Minute Entry; 04/20/2018 Minute Entry; Transcript (ECF Nos. 18, 21, 23, 24). Following the conclusion of the *Sell* hearing, counsel for the government, in accordance with the undersigned's scheduling order, filed its motion for the involuntary administration of antipsychotic medication (ECF No. 22). Defendant filed his memorandum in opposition (ECF No. 25), and the government filed its reply (ECF No. 26).

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[2] During the evidentiary hearing conducted in accordance with the referral of this action to the undersigned, *see infra* n.3 and accompanying text, the February 2018 report was marked as Government Exhibit 2, and admitted without objection; a "Forensic Addendum and Treatment Plan" was marked as Government Exhibit 10 and admitted without objection.

[3] *See Sell v. United States*, 539 U.S. 166 (2003).

At a status hearing on August 3, 2018, the undersigned shared with counsel a concern which emerged during the undersigned's consideration of the government's motion for the administration of antipsychotic medication: to what extent, if at all, does the record reflect that any "treatment" had been rendered to Defendant during the period of his hospitalization for that purpose? After listening to counsel's preliminary responses, the undersigned ordered counsel for the government and counsel for Defendant, in turn, to file a memorandum in which each provided the citations to the transcript where the answer to the undersigned's questions could be found. Counsel filed their submissions, *see* ECF Nos. 27, 28, in accordance with the undersigned's scheduling order.

Upon consideration of the entirety of the record herein, the undersigned now recommends that the Government's Motion to Medicate Involuntarily Defendant to Restore Competency (ECF No. 22) be denied.

APPLICABLE AUTHORITIES

The determination that Defendant is not competent, *see* 07/17/2017 Minute Entry, and the subsequent order, in accordance with Section 4241(d) of Title 18, committing him to the custody of the Attorney General for a period of 120 days for a determination of whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward, *see* Order (ECF No. 8), form the backdrop against which the pending motion is presented. Section 4241 of Title 18 provides, in pertinent part, that

> [i]f, after [a hearing following a psychiatric examination and report of said examination], the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The

> Attorney General shall hospitalize the defendant *for treatment* in a suitable facility . . . for such reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward[.]

18 U.S.C. § 4241(d)(1) (emphasis supplied).

In *Sell v. United States*, the Supreme Court of the United States held that a defendant may be involuntarily medicated to render him competent to stand trial if the government establishes that: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those concomitant governmental interests; (3) involuntary medication is necessary to further those interests, and (4) administration of the drugs is medically appropriate, *i.e.*, in the patient's best medical interest in light of his medical condition. 539 U.S. at 180-82.[4] The Supreme Court also made plain that its interest in the prosecution "is undiminished by special circumstances." *United States v. Dillion*, 738 F.3d 284, 287 (D.C. Cir. 2013) (citing *Sell*, 539 U.S. at 180-81).

The Supreme Court in *Sell* did not address the standard of proof, but the Circuit Courts, including the District of Columbia Circuit ("D.C. Circuit"), have held that the government is required to prove each *Sell* factor by clear and convincing evidence. *United States v. Dillon*, 738 F.3d at 291.

The Supreme Court, through its precise articulation of the four factors a district court must evaluate in ruling on a request by the government for the involuntary administration of antipsychotic medication to a defendant in a criminal case in an effort to restore competency, appears to have contemplated that the involuntary administration of antipsychotic medication for

[4] The *Sell* Court distinguished this inquiry from the inquiry to be undertaken where a request for the involuntary administration of antipsychotic medication is predicated upon a defendant's dangerousness. *Id.* at 181-182. As no such request has been made in this action, the undersigned omits any discussion herein of the distinction between the standards.

that purpose was not the norm. *Sell*, 539 U.S. at 180 (observing that instances in which the standard will permit involuntary administration of drugs solely for the purpose of an effort to restore a defendant's competency may be "rare."); *see also United States v. Garnos*, No. 3:15-CR-30021, 2017 WL 548215, at *5 (D. S.D. Feb. 10, 2017) (observing that "[t]he involuntary administration of antipsychotic medication is an extreme remedy[.]"); *United States v. Almendarez*, 179 F. Supp 3d 498, 509 (W.D. Pa. 2016) (noting consideration of "the Supreme Court's admonition that an order permitting forced medication is warranted only in limited circumstances[]" in the decision to deny the government's request to permit involuntary administration of antipsychotic medication for the sole purpose of an effort to restore competency).

DISCUSSION

The undersigned, upon extensive consideration of the applicable authorities in the context of the pending motion, concludes that the consideration of the *Sell* factors cannot be undertaken in a vacuum; rather, the undersigned regards the statutory provision that a defendant committed to the custody of the Attorney General pursuant to Section 4241(d) of Title 18 shall be hospitalized "for treatment" as one which is integral to the determination of a motion for the involuntary administration of antipsychotic medication in an effort to restore competency. Reading this statute in conjunction with *Sell* and its progeny, the undersigned concludes that "treatment" during a 120-day hospitalization is a necessary predicate to a governmental request for authorization to involuntarily administer antipsychotic medication for the purpose of an effort to restore an incompetent defendant's competency.

The undersigned is mindful that no court – to the best of this court's knowledge – has so held. However, the undersigned, heeding the *Sell* Court's caution that an order authorizing the

involuntary administration of antipsychotic medication to a defendant who is incompetent for the sole purpose of an effort to restore competence must be "rare[,]" now holds that the government, as a factual prerequisite to a *Sell* motion, must demonstrate that the "treatment" mandated by the statute has been undertaken, albeit without the intended result.[5]

The undersigned undertook a comprehensive review of the record herein in search of evidence that Defendant was afforded "treatment" during his 120-day hospitalization pursuant to Section 4241(d) of Title 18. The undersigned preliminarily determined that there was no such evidence in the record. As part of that preliminary determination, the undersigned found two exchanges during the *Sell* hearing particularly illustrative. The first occurred during the cross-examination by Defendant's counsel of Logan Graddy, M.D., the psychiatrist on whom the government principally relied:

> Q. And you testified before you've never met Mr. Gamarra; correct?
>
> A. I may have seen him around. I don't know. I looked at his picture. I'm not sure honestly.
>
> Q. Okay. You certainly have never sat down and discussed what his potential treatment needs might be; is that correct?
>
> A. I may have been in a treatment team meeting with him. The name sounds familiar.

04/18/2018 Hearing Transcript 135:8-15.

The second occurred during the cross-examination of Evan DuBois, forensic psychologist and a co-signer of the report through which the hospital first communicated the government's request for a *Sell* hearing:

> Q: Was [art therapy, music therapy or individual therapy] offered to Mr. Gamarra?

[5] Absent this factual prerequisite, the involuntary administration of antipsychotic medication in an effort to restore competency could well become the norm, as the clinicians engaged to discharge the Attorney General's responsibilities would have no need to even attempt the more time- and labor-intensive treatment of mental illness.

A. I don't recall.

04/18/2018 Hearing Transcript 94:1-8.

The undersigned also found illustrative the text of the report of Defendant's 120-day hospitalization. The section of the report in which "Psychiatric Treatment" is addressed is a scant one-half page of text. A fair summary of this section is that Defendant, upon his arrival, was "initially seen by psychiatry staff"; that thereafter he "was seen for follow-up by a clinical pharmacist"; that a second "follow-up" was scheduled two weeks later, and that he received "continued encouragement" to comply with the prescribed medication regimen. *See* Government Exhibit 2 at 6.[6]

The undersigned gave counsel the opportunity to address the undersigned's concern by directing them to review the transcript of the three-day *Sell* hearing, and then to provide the citations to the pages and line numbers dispositive of whether, or not, Defendant was provided "treatment" during the 120-day hospitalization pursuant to the undersigned's order. Counsel for the government, on the record, already had effectively conceded that the answer to the undersigned's inquiry was no: counsel stated that medication was "offered[,]" but "nothing else[,]" such as "talk therapy[,]" was "offered."

Counsel for the government and counsel for Defendant each filed a submission in accordance with the undersigned's scheduling order. With respect to the submission filed by counsel for the government, the undersigned finds that the government failed to offer a single

[6] The report of the "treatment" provided to the defendant in *Dillon*, in which the District Judge assigned to this action granted the government's motion for the involuntary administration of psychotropic medication in an effort to restore competency, is not reflected in the published opinion. *United States v. Dillon*, 943 F. Supp. 2d 30 (D.D.C. 2013). However, in one of the more recent published opinions available as of this writing, the record – in stark contrast to the instant one – reflected the defendant's "*continued refusal to participate in treatment* or take psychiatric drugs of any sort[.]" *Garnos*, 2017 WL 548215, at *1 (emphasis supplied); here, however, Defendant was offered nothing other than medication (which he refused to take as prescribed), and no other "treatment" was even proposed.

citation to the record which indicated that Defendant was offered "treatment" during his 120-day hospitalization for that purpose. Rather, the government – in a manner comparable to its response to the undersigned's inquiry during the August status hearing – cited the opinions of the government's witnesses that the administration of medication is regarded as the most effective means to restore an individual's competency. *See, e.g.*, Government's Supplemental Memorandum to Government's Motion to Medicate Involuntarily Defendant to Restore Competency (ECF No. 27) at 2 (multiple citations to testimony of Dr. Graddy regarding safety and efficacy of antipsychotic medications).[7]

Counsel for Defendant, in a manner responsive to the concern which the undersigned articulated on the record during the August status hearing, offered citations to the record indicative of the government's failure to offer "treatment" to Defendant during his 120-day hospitalization for that purpose. *See* Defendant's Supplemental Memorandum to Defendant's Opposition to Government's Motion to Forcibly Medicate Defendant (ECF No. 28) at 2-6.

In the period of in excess of two weeks which has elapsed since Defendant filed the citations indicative of the government's failure to offer "treatment[,]" the government has neither filed a reply nor requested a further hearing.

CONCLUSION

The record of the *Sell* hearing reflects that during the 120-day hospitalization of Defendant pursuant to Section 4241(d) of Title 18, the government, through the staff at the hospital in which Defendant was placed undertook an "initial" visit, two "follow-up" visits (one by a clinical

[7] The government also included references to a "competency restoration group"; however, the government's own witnesses testified that such groups do not constitute "treatment" of mental illness, and instead, are intended as a vehicle for instruction regarding courtroom procedures.

pharmacist), and "continued encouragement" – on dates and by individuals never fully specified by the government – to comply with the prescribed medication regimen. The undersigned, for the reasons set forth in detail herein, finds that the government thereby failed to comply with the mandate of the statute, and that such failure serves as a bar to the government's request for authorization to involuntarily administer antipsychotic medication.[8]

It is, therefore, this 24th day of August, 2018,

RECOMMENDED that the Government's Motion to Medicate Involuntarily Defendant to Restore Competency (ECF No. 22) be **DENIED**.

Deborah A. Robinson

Digitally signed by Deborah A. Robinson
DN: c=US, st=District of Columbia, l=Washington, o=United States District Court for the District of Columbia, ou=U.S. Magistrate Judge, cn=Deborah A. Robinson, email=Chambers_DoNotReply@dcd.uscourts.gov
Date: 2018.08.24 16:41:17 -04'00'

DEBORAH A. ROBINSON
United States Magistrate Judge

Within fourteen days, either party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the findings and recommendations to which objection is made, and the basis of each such objection. In the absence of timely objections, further review of issues addressed herein may be deemed waived.

[8] In view of this finding, the undersigned has omitted any discussion of the four *Sell* factors. However, should the assigned District Judge regard consideration of the four factors as necessary, the undersigned regards the findings set forth herein – in conjunction with the findings set forth by the Court in *Gamarra*, 308 F. Supp. 3d at 231 – as "special circumstances" weighing against the government's request for authorization for the involuntary administration of antipsychotic medication. Put another way, the government should not be permitted an "end run" around *two* separate statutory requirements in order to achieve its goal of involuntary medication.