No. _____

IN THE
Supreme Court of the United States

CHRISTOPHER LEWIS TUCKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

ERIC JOSEPH BRIGNAC
CHIEF APPELLATE ATTORNEY
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
eric_brignac@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether a district court may order forcible medication under *Sell v. United States* when (1) record evidence shows that the government has already tried the forced medication and it did not work and (2) the defendant has already served half a decade in pretrial custody.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. *Tucker*, 60 F.4th 879 (4th Cir. Case Nos. 20-4537, 21-4166, 22-4025, 22-4026, Feb. 24, 2023; Petition for en banc review denied March 24, 2023).

United States District Court for the Middle District of North Carolina:

United States v. *Tucker*, No. 1:17-cr-00221-TDS-1

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Petitioner Christopher Lewis Tucker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 60 F.4th 879 and produced at Pet. App. 1a. The Fourth Circuit denied a timely petition for rehearing en banc, which is produced at Pet. App. 19a.

JURISDICTION

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. §§ 922, 2251, 2252A, 3231. Mr. Tucker timely appealed the district court's order of forcible medication, which is a permissible ground for interlocutory appeal. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 over that timely interlocutory appeal. The Fourth Circuit issued its opinion affirming the district

court's forcible medication order on February 24, 2023. The Fourth Circuit denied a timely petition for rehearing en banc on March 24, 2023. This petition is being timely filed on June 12, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. V.

STATEMENT

In April 2017, a criminal information was filed against Mr. Tucker in the Middle District of North Carolina. Mr. Tucker initially signed a written agreement to plead guilty to one count of transporting child pornography, in violation of 18 U.S.C. §§ 2252A(a)(1) and (b)(1), which carries a statutory penalty of five to twenty years of imprisonment. But at the hearing for the district court to accept the plea on April 25, 2017, Mr. Tucker rejected the plea and pleaded not guilty.

The Government later obtained a complaint, indictment, and superseding indictment, charging Mr. Tucker with two counts of sexual exploitation of children, in violation of 18 U.S.C. §§ 2251(a) and (e); one count of transporting child pornography, in violation of 18 U.S.C. §§ 2252A(a)(1) and (b)(1); one count of possessing firearms and ammunition as a person addicted to a controlled substance, in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2); and one count of receipt of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1).

Due to concerns about Mr. Tucker's competency, the district court ordered him evaluated and then committed for restoration. The United States claimed that

it was unable to restore Mr. Tucker and moved the district court for an order to forcible medicate him under *Sell v. United States,* 539 U.S. 166 (2003).

At the *Sell* hearing on September 18 and 24, 2019, Drs. Stribling Riley and Graddy testified from the BOP and Dr. Hilkey testified for Mr. Tucker. Dr. Riley diagnosed Mr. Tucker with schizoaffective disorder, bipolar type, and testified that he "has presented with prominent delusions," which she agreed are intertwined with his legal situation. She opined that he was not competent because he "continues to believe that others, the Government, is conspiring to bring charges against him." She explained that Mr. Tucker had been prescribed the same dosage of the same medications for over a year, since around July 2018, but remained incompetent and had never been restored despite "almost 100 percent" medication compliance over the preceding four months. She agreed that "four to five months" is a reasonable timeframe to determine whether Mr. Tucker could be restored to competency.

Dr. Graddy diagnosed Mr. Tucker with schizoaffective disorder and a mood disorder. He acknowledged that labs should have been taken earlier in the case to assess the level of medication in Mr. Tucker's bloodstream: "I have to take responsibility for that personally. I'm sure I could have done better in this case, and I know I could have. So I take responsibility for that." He opined that his proposed treatment plan was "substantially likely to render Mr. Tucker competent" within "about four months." But he acknowledged that Mr. Tucker was previously compliant with his medications for approximately four months and did not regain

competency. He also acknowledged that his recommended medication has "some . . . very serious risks," including "sudden death." And he agreed that Mr. Tucker's weight is concerning with regard to the likelihood of side effects.

Dr. Hilkey diagnosed Mr. Tucker with delusional disorder (explaining that he agreed with prior evaluations from Drs. Gray and Gilbert) and explained that such a disorder is "typically . . . not responsive to psychotropic medications" and "very difficult to treat." He explained that medication "will [not] change the belief systems. Those are cognitively held . . . well ingrained and will not respond to medication." For that reason, he opined that BOP's proposed treatment regimen would be "substantially unlikely" to restore Mr. Tucker to competency. Although Mr. Tucker had consistently demonstrated the ability to understand the factual aspects of his legal case, Dr. Hilkey explained that he cannot rationally assist his lawyers because that ability is "clearly impaired by his belief that this is a Government conspiracy" and he cannot "challenge in a rational way the allegations against him." Counsel for Mr. Tucker noted that he had been in custody for "some 30 months and four months of almost 100 percent compliance" with the Government's medication regimen and he remained unrestored: "At some point they can't keep trying and failing and trying and failing, hoping to get it right."

On October 22, 2019, the district court ordered Mr. Tucker involuntarily medicated under *Sell* but also stayed its order pending Mr. Tucker's appeal of that order. The court found that the Government proved by clear and convincing evidence that important Governmental interests were at stake because Mr. Tucker

faced two charges with fifteen to thirty years of sentencing exposure, two counts of five to twenty years of sentencing exposure, and one count of up to ten years of sentencing exposure. It did not find these interests mitigated by the possibility of civil commitment or an insanity defense. It found that involuntary medication would significantly further those interests by making it "substantially likely to render the defendant competent to stand trial" within four to five months and "substantially unlikely to [cause] side effects that will interfere significantly with [Mr. Tucker's] ability to assist counsel." The court found the regimen "specifically tailored" to Mr. Tucker and, in its view, the Government's failure to restore competency "appears largely attributable to Tucker's refusal . . . to comply with the treatment regimen." It also held "that involuntary medication is necessary to further those interests" because "less intrusive treatments are unlikely to achieve substantially the same results" because, in its view, Mr. Tucker (who had never been found competent by the court) had periods of "poor compliance where he decides he does not want to take his medication." It held that administration of the drugs was medically appropriate and in Mr. Tucker's best medical interest because, in its view, Mr. Tucker "was on the verge of competency before he began refusing his medication."

On February 24, 2020, the expiration date of the district court's restoration period, BOP filed a forensic evaluation opining that Mr. Tucker was competent to stand trial, despite the fact that no involuntary medication had been administered.

Meanwhile, Mr. Tucker's appeal of the district court's forced medication order was pending. On September 24, 2021, the Fourth Circuit ultimately remanded back to the district court so it could reconsider its *Sell* order based on events that occurred during the pendency of the appeal. The court specifically asked "whether the administration of drugs, as currently prescribed, 'is substantially likely to render [Tucker] competent to stand trial,' " noting that the Government must prove as much by clear and convincing evidence to justify a *Sell* order of forced medication. And it emphasized that the district court was free to reconsider whether any of the remaining *Sell* factors still weigh in favor of forced medication.

A hearing on the Fourth Circuit's remand was held on December 3, 2021. JA0858. Dr. Logan Graddy testified that Mr. Tucker was "substantially likely" to be restored to competency within four to six months if ordered to comply with the Government's forced medication regimen because he has a "treatable mental illness that has responded to the medication in the past," despite the fact that Mr. Tucker had been in custody since 2017 and had likely never been restored to competency (in light of Dr. Cunic's revocation of BOP's certificate of restoration and consistent testimony from her and other experts about Mr. Tucker's persistent incompetence). Dr. Graddy acknowledged that "Mr. Tucker may be one of the longer cases that has been ongoing . . . in my care as part of pretrial proceedings for an extended period of time." Mr. Tucker's counsel confirmed he had then been in custody for 56 months—nearly five years.

On December 31, 2021, the district court entered an order granting the Government's motion for involuntary medication under *Sell*. The court held the Government had an important interest by virtue of Mr. Tucker's now applicable fifteen-year mandatory minimum sentence; it did not find that interest mitigated by the possibility of civil commitment (because BOP opined he did not meet criteria for commitment). Moreover, it faulted Mr. Tucker—whom it has *never* found competent even when compliant—for being "purposefully non-compliant with his medication." It held that forcible medication was "substantially likely to render Tucker competent to stand trial," within "four to six months" despite the fact that it had not yet restored him during a previous similar length of treatment compliance. It held that "no alternative, less-intrusive means likely to achieve substantially the same result have been identified." And it held that the risk of side effects was "manageable" and "not substantially likely to interfere with Tucker's ability to assist counsel at trial." In contravention of Dr. Cunic's testimony at the *Sell* hearing, the court found that "the medication has restored Tucker's competency when taken voluntarily by Tucker as prescribed."

Mr. Tucker timely appealed, arguing that the district court erred in not properly considering the five years he had already served in pre-trial custody as well as the government's willingness to accept a plea to a lesser charge in weighing the government's interest. Mr. Tucker also contended that the district court did not properly account for the fact that Mr. Tucker had already tried the district court's

proposed order of medication voluntarily and it did not restore him. The Fourth Circuit rejected both of these arguments and affirmed the district court.

This petition follows.

REASON FOR GRANTING THE PETITION

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S OPINION IN *SELL*

This Court should grant review because the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

In order to "administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges," the Government must prove four things to the district court. *Sell,* 539 U.S. at 179. First, the court must find that "*important* Governmental interests are at stake;" second, the court must find "that involuntary medication will *significantly further* those . . . state interests;" third, the court must find "that involuntary medication is *necessary* to further those interests;" and, fourth, the court must find "that administration of the drugs is *medically appropriate.*" *Id.* at 181 (emphasis in original).

Forcible "injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 299 (1990). "Indeed, it has been observed that 'when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense.'"

United States v. Bush, 585 F.3d 806, 813 (4th Cir. 2009) (quoting *Harper*, 494 U.S. at 237-38 (Stevens, J. dissenting)).

"Because of the physical violence inherent in forcible medication, [this] Court has held that the Government bears the burden of demonstrating an 'overriding' or 'essential' interest to justify such treatment of an accused." *United States v. White*, 620 F.3d 401, 422 (4th Cir. 2010) (Keenan, J. concurring) (citing *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992)). The Court "intended to pay more than lip service to the imperative of individual liberty in its admonishment that forced medication is constitutionally permissible in 'limited circumstances.'" *Id.* at 422 (quoting *Sell*).

The district court committed two primary errors that extend its actions beyond the "constitutionally permissible" limited circumstances that the Constitution demands. First, the district court did not properly account for the record evidence showing that the Government's treatment plan was unlikely to restore Mr. Tucker to competency. Mr. Tucker has *already* been compliant with a course of voluntary medication for four months, and it did not restore him to competency, undercutting the Government argument that four *more* months of medication would have the desired effect. Additionally, even the Government expert who proposed the treatment plan acknowledged his mistakes in treating and diagnosing Mr. Tucker, undermining his opinion that his plan could restore Mr. Tucker to competency. It would instead risk a massive deprivation of liberty and serious side effects and likely accomplish nothing.

Second, the court did not account for the significant time that Mr. Tucker has been detained pretrial in weighing the Government's interest in prosecuting him. In 2017, the United States was willing to accept a plea to transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1). Had this plea happened, Mr. Tucker would have had a sentencing range of 5-20 years and a likely advisory Guidelines range of 60 months of imprisonment. Mr. Tucker has been in continuous custody since 2017 and has *already overserved that anticipated sentence*. This Court has indicated that the length of pre-trial detention presents a key consideration when weighing the Government's interest under the first *Sell* factor. Here, the district court did not properly consider it. That's reversible error.

A. The district court clearly erred in finding that involuntary medication would significantly further the Government's interest.

In order to properly conclude that involuntary medication will significantly further state interests, the district court "must find that the administration of the drugs is substantially likely to render the defendant competent to stand trial, [and] that administration of the drugs is 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. Here, the district court clearly erred because it basically ordered the same medication course (with a slight dosage alteration) that had already failed to restore Mr. Tucker to competency.

The court relied on Dr. Graddy's opinion that 300mg of olanzapine once every 10 to 14 days would be substantially likely to render Mr. Tucker competent to stand

trial. This reliance was erroneous because it did not account for Mr. Tucker's specific facts and circumstances. *Sell* requires a court to assess "not whether a proposed treatment plan is likely to work in general, but whether it is likely to work as to *a particular defendant*." *United States v. Watson,* 793 F.3d 416, 425 (4th Cir. 2015) (emphasis added).

And we know that Dr. Graddy's proposed treatment plan would be unlikely to work regarding Mr. Tucker because *it had already been tried and failed.* Mr. Tucker had been prescribed olanzapine in the Bureau of Prisons, and he was "100 percent" compliant with it. And Dr. Graddy acknowledged that that medication did not work; it did not render Mr. Tucker competent.

What the medication did do was cause Mr. Tucker to experience serious side effects. He gained almost 100 pounds while voluntarily complying with Dr. Graddy's proposed treatment plan. In response to Mr. Tucker's concern about that dangerous side effect, Dr. Graddy noted that BOP has a salad bar. He further agreed that "higher doses do have a higher risk of side effects." Those other serious side effects include involuntary muscle movement and, possibly, sudden death.

Continuing, Dr. Graddy admitted that he did not adequately monitor the drug levels in Mr. Tucker's blood when Mr. Tucker was taking olanzapine involuntarily, stating that "I have to take responsibility for that personally. I'm sure I could have done better in this case, and I know I could have. So I take responsibility for that." Dr. Graddy did not properly monitor Mr. Tucker's medication levels because the BOP treatment staff erroneously believed that Mr.

Tucker "seemed quite close to competency, and . . . [they] really believed that he was going to get there."

BOP's ongoing erroneous belief that Mr. Tucker was always *this close* to becoming competent infected Dr. Graddy's entire analysis. Mr. Tucker is legally incompetent, but he is an intelligent person. He understands "the role of his attorneys . . . the role of the U.S. attorneys . . . the role of the judge." He can thus appear superficially competent. "He is able to be quite lucid, charming, engage in laughter, give you accurate reports of history." But he is nonetheless legally incompetent due to a delusional disorder. He cannot assist his attorneys because his ability to understand the charges against him and assist his attorneys is "impaired by his belief that [the prosecution] is a government conspiracy," so he is unable "to challenge in a rational way the allegations against him." These delusional beliefs "are rigid and fixed . . . over a lengthy period and far exceed those manifested by most oppositional defendants."

And medication like olanzapine will not change Mr. Tucker's "well ingrained" delusional belief system. Mr. Tucker's "cognitively held" beliefs cannot be medicated out of him. "Delusional disorders typically are not responsive to psychotropic medications." Instead, intensive therapy would be the proper treatment method, and even that may not be successful.

This delusional disorder—and its non-responsiveness to medication—explains why the olanzapine failed to restore Mr. Tucker when he took it with 100% compliance. It also explains why the Government experts keep opining that it will

work because Mr. Tucker always seems *so close* to restoration. That is the unfortunate nature of a delusional disorder—one can appear sane and lucid on every matter that does not involve the disorder. As long as Mr. Tucker is not talking about the alleged crime and his delusions regarding government prosecution, "he is well organized. He's lucid. He's oriented. There is no indication of any distortion." And, in Mr. Tucker's case, that presented as an illusory nearness to competency.

The BOP evaluators who thought that Mr. Tucker was near to competency did not "really [go] into details about the specifics of Mr. Tucker's case, which are the very triggers that provoke many of the conspiratorial ideas that he holds in relationship to the alleged offense." This explains why those evaluators—working in conjunction with each other—are the only two who diagnosed Mr. Tucker with a schizophrenic spectrum disorder. Dr. Hilkey testified to these facts at each of the hearings at which he appeared; his reports all confirm this diagnosis and prognosis.

Considering the drug's serious side effects and the fact that it did not work on him, Mr. Tucker understandably did not want the BOP to keep trying it. "As some point, they can't keep trying and failing and trying and failing, hoping to get it right." That is not, his lawyers argued, a proper exercise of *Sell's* narrow exception to bodily autonomy.

The Fourth Circuit did not agree—deferring to the district court's holding that the government's plan would work. And while Mr. Tucker appreciates the deference that an appellate court must provide to the district court, that deference

is not limitless. Here, *Sell* required the Fourth Circuit to step in. It did not, so it erred. This Court's review is necessary to correct this error.

B. The district court erred in not properly considering that Mr. Tucker has already served over five years in pre-trial custody.

Additionally, the district court considered the importance of the Government's interest as a static factor based solely on the allegations against Mr. Tucker. But, from the time of *Sell* itself, this Court has emphasized that courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Sell,* 539 U.S. at 180. Those individual facts include determining whether "the defendant has already been confined for a significant amount of time" because any convicted defendant would receive credit for that time as time served. *Id.* (citing 18 U.S.C. § 3585(b)).

"The operative word here is 'significant.'" *White*, 620 F.3d at 414. To be sure, the Government has an interest in prosecuting crimes beyond incarceration. *See Bush,* 585 F.3d at 815. But, consistent with *Sell*, appellate courts—when conducting de novo review of the district court—must heavily factor in the time already served. *White,* 620 F.3d at 414. Specifically, they must weigh that time that against the likely sentence that the court would impose if the defendant was convicted. *Id.*

As argued above, Mr. Tucker has been in custody for over half a decade. That is—by any measure—an incredibly long time. Criminal defendants who have their cases resolved by a guilty plea spend an average of 204 days in pretrial custody. *See* U.S. Dept. Of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Justice Statistics, 2020 *at* 10, *available at*

bjs.ojp.gov/content/pub/pdf/fjs20.pdf (last visited June 8, 2023). Mr. Tucker has spent over 1,900 days (and counting) in federal custody. The district court did not properly weigh this incredibly long time when reconsidering the first *Sell* factor.

Weighing this lengthy period of incarceration against the Government's interest in incarceration reveals how "significant" this pretrial incarceration has been for purposes of the *Sell* analysis. We have rare insight into the Government's view of the seriousness of Mr. Tucker's offense because the Government was prepared, in 2017, to offer Mr. Tucker a plea to one count of transportation of child pornography. This offense carries a statutory sentencing range of 5-20 years of incarceration. 18 U.S.C. § 2252A(a)(1), (b)(1). And while we cannot compute precisely what his Guidelines would be without a presentence report, we know that the base offense level would be a 22 and that he would receive a 3 point reduction for acceptance of responsibility. U.S.S.G. §§ 2G2.2(a)(2); 3E1.1. Considering his lack of criminal history, even if certain enhancements were to apply, he would likely have had an advisory Guidelines range at or near the minimum sentence of 60 months on that plea. *See* U.S.S.G., Ch. 5, Pt. A.

Mr. Tucker has served an effective sentence of over 70 months already.[1] Thus, his "pretrial detention (taking account of likely good time credits) will have extended *considerably longer* than [his] likely sentence." *White,* 620 F.3d at 418.

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[1] Federal prisoners can receive a 15 percent reduction in their imposed sentence under 18 U.S.C. § 3642(b), a mechanism commonly referred to as "good-time credit." *See United States v. Gary,* 613 F.3d 706, 708 n.1 (7th Cir. 2010). Thus, his 60+ months of incarceration are equal to a 70+ month sentence.

And though this Court hasn't given a precise mathematical value to *Sell's* "significant" standard, "it is self-evident that [Mr. Tucker's] case would meet any standard." *Id.* A period of pre-trial detention that covers an entire anticipated sentence "clearly exceeds 'significant amount.'" *Id.*

This Court's review is necessary to correct the Fourth Circuit's misapplication of *Sell.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

/s/Eric J. Brignac
ERIC JOSEPH BRIGNAC
CHIEF APPELLATE ATTORNEY
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
eric_brignac@fd.org

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Counsel for Petitioner