No._____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL BOIMA,
Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Sell v. United States*, 539 U.S. 166, 179-80 (2003), this Court held that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."

The *Sell* Court, however, provided scant guidance on what constitutes a "serious" criminal charge implicating important governmental interests and warranting the involuntary administration of medication. Consequently, the lower federal courts have devised many different, and often conflicting, approaches to identifying "serious" crimes for *Sell* purposes. The question presented by this petition is:

How should district courts decide whether a crime is "serious" within the meaning of *Sell*?

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PETITION FOR WRIT OF CERTIORARI

Samuel Boima respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Second Circuit in *United States v. Boima* is reported at 114 F.4th 69 (2024) and attached at pages 1- 23 of the appendix to this petition.[1]

JURISDICTION

The judgment of the Second Circuit entered on August 22, 2024. (A 23). This petition is filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] The appendix will be cited as "A #."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are: 1) U.S.C.A. Const. Amend. V (A 24); 2) 18 U.S.C. section 4241 (A 25-26); 3) 18 U.S.C. section 4246 (A 27-29); and 4) 18 U.S.C. section 4247 (A 30-33).

STATEMENT

According to court documents Mr. Boima was born on December 15, 1989, to Lawrence and Rosalyn Boima in Sierra Leone. As a result of the civil war that engulfed the country beginning in 1991,[2] Mr. Boima's parents relocated to the United States, leaving him and his siblings behind. Mr. Boima was raised by his grandparents until they were killed in 1998 and he found himself at the mercy of the rebels challenging the government of Sierra Leone. In June of 1999, Mr. Boima fled to Gambia with his aunt.

Just over two years later, Mr. Boima and his siblings rejoined their mother in the United States as refugees. During the tenth grade Mr. Boima's mother kicked him out of the house and Mr. Boima dropped out of school and became homeless.

Around that time, Mr. Boima began to amass an arrest record. Mr. Boima's involvement with the criminal justice system brought him to the attention of the immigration authorities. He was ordered removed from the United States for conviction of an aggravated felony on March 1, 2011, and the removal order became

[2] https://en.wikipedia.org/wiki/Sierra_Leone_Civil_War (last visited November 17, 2024).

administratively final when the Board of Immigration Appeals (BIA) denied Mr. Boima's appeal on July 29, 2011. Mr. Boima's order of supervision was revoked, and he was taken into Department of Homeland Security/Immigrations and Customs Enforcement (DHS/ICE) custody on September 4, 2019.

Mr. Boima was transferred to the ICE Buffalo Federal Detention Facility (BFDF) and held there pending his deportation to Sierra Leone. On May 25, 2020, two BFDF detention officers were called to Mr. Boima's housing unit where they intervened in an "altercation" between Mr. Boima and another detainee. The detention officers handcuffed Mr. Boima, brought him to his cell, and ordered him to remain on the bed as they exited. It is alleged that as the detention officers withdrew, Mr. Boima spit a mixture of saliva and blood on them.

On July 20, 2020, the government filed a criminal complaint charging Mr. Boima with assaulting federal officers under 18 U.S.C. § 111(a)(1). Mr. Boima refused to be transported to his initial appearance. According to defense counsel, Mr. Boima claimed to be represented by an immigration lawyer who did not, as far as she could determine, represent him. The initial appearance was rescheduled to allow her more time to try to persuade Mr. Boima to participate.

The rescheduled initial appearance took place on August 10, 2020, by videoconference. Mr. Boima initially refused to leave his cell to attend the hearing. The magistrate judge asked the jail deputies to convey to Mr. Boima that she was going to conduct an initial appearance, that he was required to participate, and that

she was concerned his behavior was so irrational that it might warrant an examination into his competency.

The deputies reported back that Mr. Boima denied that defense counsel represented him. He claimed he was represented by a lawyer named "Quinn" from New Orleans. In fact, Mr. Boima denied having "a case" at all. He also insisted that he was not mentally ill. After a second discussion with jail personnel, Mr. Boima agreed to participate in the initial appearance. However, when he joined the hearing he launched into an incoherent speech.

The magistrate judge explained that Mr. Boima's behavior appeared to be "completely irrational" and gave her reasonable cause to believe that an evaluation of his competency to stand trial was in order. The magistrate judge then announced her intention to order Mr. Boima evaluated "unless I receive any information…that leads me to revisit this." On August 14, 2020, the magistrate judge ordered Mr. Boima evaluated for competency to stand trial. (A 74-78).

A competency to stand trial evaluation authored by BOP psychologist Kari M. Schlessinger was filed on October 7, 2020. Dr. Schlessinger described frankly psychotic behavior by Mr. Boima during the evaluation process. She diagnosed Mr. Boima with unspecified schizophrenia spectrum and other psychotic disorder. Of Mr. Boima's prognosis, Dr. Schlessinger wrote:

> Given Mr. Boima's symptoms, it is unlikely he will experience any spontaneous remission or reduction in impairment without appropriate interventions such as psychotropic medication

> and psychotherapy. Additionally, his presentation and interactions with others will continue to be complicated by the enduring nature of his paranoid thoughts. Due to his lack of insight with regard to his delusional beliefs and the persistency of his current delusional framework, Mr. Boima's prognosis is poor. It is likely the severity or course of Mr. Boima's illness will not change unless he adheres to treatment recommendations. It is likely Mr. Boima will require consistent and intensive treatment, as well as ongoing care and monitoring, if he is to achieve lasting psychiatric stability or meaningful reduction of symptoms.

Because of his psychosis, Dr. Schlessinger assessed Mr. Boima not competent to stand trial, an opinion she repeated at the June 2, 2021, competency hearing.

On June 30, 2021, the magistrate judge issued an R&R suggesting that the district court find Mr. Boima not competent to stand trial and order him into the custody of the Attorney General "for a reasonable period not to exceed four months, to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to stand trial in this case." Neither party objected to the R&R, and on July 15, 2021, the district court issued a D&O finding Mr. Boima not competent to stand trial and committing him to the custody of the Attorney General.

On March 21, 2022, Kristina P. Lloyd, a psychologist with the BOP, submitted a forensic evaluation of Mr. Boima. Dr. Lloyd's description of Mr. Boima's behavior during the evaluation process was consistent with Dr. Schlessinger's. Mr. Boima continued to deny that he had a pending criminal case or a mental illness, and repeatedly refused offers of psychotropic medication. Dr. Lloyd diagnosed Mr. Boima

with schizophrenia. Dr. Lloyd opined that Mr. Boima remained incompetent to stand trial. On the issue of restorability, she wrote:

> Based upon the data that most individuals with chronic psychotic disorders have some degree of improvement in the symptoms of their illness, the undersigned evaluator opines a substantial probability exists that Mr. Boima's competency to stand trial can be restored with appropriate treatment with (sic) and that less intrusive methods of treatment, such as psychotherapy, are not likely to restore his competence. Mr. Boima has refused to accept recommended medication treatment on a voluntary basis. Should the court determine that additional restoration efforts are appropriate, we would request the court order treatment with psychotropic medication on an involuntary basis.

She concluded: "If the Court finds that the first prong of *Sell* has not been met by clear and convincing evidence, Mr. Boima may be subject to further evaluation under § 4246."

About two months after Dr. Lloyd filed her report, the district court wrote to the Assistant United States Attorney (AUSA) prosecuting Mr. Boima. The letter was to "strongly urge the Government to consider withdrawing the complaint against Mr. Boima." The district court explained:

> There are several reasons for this. The charge of assault involves Boima spitting at some contract officers at the Batavia facility after he and another inmate had been separated. Certainly, for the officer affected, it was unsettling, but no serious injuries occurred and such acts from an inmate who now has demonstrated mental health issues may not be all that uncommon in

> a prison setting.
>
> Boima has certainly paid the price already. He has been detained in custody for almost two years and he has yet to be indicted…
>
> …I would suggest that the Government's interest in this prosecution is quite low…A hearing will take time, perhaps many months, and Boima remains detained for an excessive period of time. I suspect that if an application is made, he will be in custody many months, perhaps years longer than the guideline sentence might be for one who is convicted of spitting at a prison guard.
>
> …As I understand it, Boima has been ordered deported to his country of origin and a final order of deportation has been issued. If the prosecution in federal court is withdrawn, and assuming Boima is not determined to be a danger to himself or others, he would be released from federal custody and turned over to Immigration officials to continue the process of effecting his deportation from this country.

The government did not withdraw the complaint against Mr. Boima, and a *Sell* hearing commenced on June 29, 2020. Before testimony began, defense counsel asked the district court to rule on the "threshold legal question" of whether the government had a sufficiently strong interest in the prosecution of Mr. Boima to warrant subjecting him to involuntary psychotropic medication. The district court declined:

> …I think it's better for the Court to have all the testimony and then make that determination. I think it's sort of a balance and you might find the Government's interest is relatively low but there are other aspects of the so-called Sell factors that indicate maybe what the Government seeks here is not inappropriate.

Dr. Lloyd was the government's witness. She reiterated her diagnosis of schizophrenia and she repeated her conclusion that Mr. Boima's mental illness rendered him incompetent to stand trial. As to restoration, Dr. Lloyd said the "first line of treatment for Schizophrenia is medication" because the illness is thought to involve an imbalance of neurotransmitters in the brain that can be "put…back in line" using psychotropic medication. Because of the severity of Mr. Boima's mental illness, Dr. Lloyd denied that any treatment other than involuntary medication was likely to improve his condition. It was Dr. Lloyd's opinion that Mr. Boima "would respond positively and be restored to competency if he was medicated properly." She estimated that the restoration process would take about five- and one-half months.

At the conclusion of the hearing the district court mused:

> …having had children and many grandchildren, you know, they get sick you say you got to take this medication. I don't want to take it. Doesn't taste good. Well, too bad. You have to take it. It's sort of the parens patrie philosophy that I'm not saying the government knows best but there's some obligation to treat people who are ill. And I know the Supreme Court has said in the Sell that it's not automatic. Even if someone is ill they have a right to refuse treatment, but when someone is incompetent I think the Court has to decide, well, does that incompetence affect his ability to make a smart decision about whether to take a needle prick.
>
> You know, are we doing Mr. Boima a favor by honoring his decision not to take medication, where if we force him to take it, you know, if there's a miracle and he suddenly becomes a totally different healed person maybe that's what we should be thinking about…

> So I certainly recognize what Sell said and the Court has to consider whether a person like Mr. Boima still has a right to refuse medication, but saying that, I wonder are we really doing him a favor by honoring that sort of constitutional right when he becomes sicker and sicker perhaps?

On July 19, 2022, BOP psychiatrist Charles A. Cloutier filed a forensic addendum. Like Dr. Lloyd, Dr. Cloutier diagnosed Mr. Boima with schizophrenia and opined that he was incompetent to stand trial. As to restorability, Dr. Cloutier wrote that Mr. Boima's "diagnosis places him in a population of patients that can attain competency over 70-80% of the time with antipsychotic medication." Dr. Cloutier recommended treating Mr. Boima with haloperidol, an antipsychotic medication, which he anticipated would prompt a "decrease in his symptoms of mental illness and an increase in functioning." He concluded:

> With reasonable medical certainty, it is my medical opinion that: Administration of involuntary antipsychotic medication to Mr. Boima is substantially likely to render him competent to stand trial and is substantially unlikely to interfere with his ability to assist his counsel; that less intrusive treatments are very unlikely to achieve the same results; and that it is clinically appropriate and indicated to treat Mr. Boima's psychotic illness with antipsychotic medication.

The district court reconvened the *Sell* hearing on September 27, 2022. Dr. Cloutier testified, reiterated his diagnosis of schizophrenia, and said that the disease is treated "[p]rimarily with antipsychotic medication" because "there's just no non-medication treatments that are effective for schizophrenia." Without medication, it

was Dr. Cloutier's opinion that Mr. Boima's condition could further worsen and was unlikely to improve. As to restorability, with medication, Dr. Cloutier anticipated that Mr. Boima's condition could improve in four to eight months.

At the conclusion of Dr. Cloutier's testimony, the district court again commented on the government's interest in the prosecution of Mr. Boima:

> And I think I expressed some concern orally and I think I wrote a letter to Mr. Moynihan, that I hoped would be shared with others in the office, that I really questioned whether this spitting incident from a person who obviously has some mental health issues was really a significant criminal event.
>
> I assume the government wants to protect those who are employed at a federal facility. But in terms of the nature of criminal conduct, this seems, to me anyway, to be pretty far down the line…
>
> And the other cases I've read where this forced medication is an issue, at least in those cases, the crimes were much more severe.
>
> And I think I talked in my letter to Mr. Moynihan about the fact that, you know, Mr. Boima's been in custody many months, maybe years more than his Guideline range would be under the Sentencing Guidelines. But the government has insisted on going forward. So that's one issue I have to decide.
> ….
>
> The bigger picture, I guess – the bigger picture that I presented to the government was, you know, why are you doing this? This is not an armed robber. This is not a meth, fentanyl dealer. But I guess that ship has sailed. The government, in its wisdom, wants to go ahead.

On October 4, 2022, the government filed a proposed treatment plan for Mr. Boima. The defense filed two responses to the government's *Sell* motion, contending that the government had not met its burden of proving any of the *Sell* factors.

On January 19, 2023, the district court issued a D&O authorizing the involuntary medication of Mr. Boima. The D&O did not contain any analysis of, or finding regarding, the first *Sell* factor – whether the government had a sufficiently strong interest in the prosecution of Mr. Boima to warrant the involuntary administration of antipsychotic medication.

On January 26, 2023, defense counsel filed, with no objection from the government, a motion to stay the *Sell* order. On February 2, 2023, the district court issued a D&O denying the motion. Mr. Boima filed a timely notice of appeal on February 2, 2023, and subsequently obtained a stay of the *Sell* order from the Second Circuit Court of Appeals.

On appeal, the Second Circuit vacated the district court's *Sell* order and remanded for further proceedings. (A 13 & 22-23). In doing so, it offered "some guidance to the district court regarding the proper framework that it, in the first instance, is to apply" in deciding whether Mr. Boima's offense was "serious" for *Sell* purposes. (A 13). It directed the district court to consider the statutory maximum and any mandatory minimum attached to Mr. Boima's offense, as well as his probable guidelines range. (A 14-16). It further urged the district court to consider "to the extent reasonably ascertainable, the individual facts of the case as they relate to the factors set forth in 18 U.S.C. § 3553(a)." (A 17).

Additionally, the Second Circuit counseled the district court to consider factors that might diminish the government's interest in prosecuting Mr. Boima: 1) the likelihood of his civil commitment; 2) the likelihood of his continued immigration detention and eventual deportation; and 3) the amount of time Mr. Boima has been in custody, and the amount of additional time he would likely serve were competency restoration to be attempted. (A 20-21). At least with respect to the prospect of civil commitment, the Second Circuit cautioned that "[b]oth the government and defense counsel should be prepared to assist the district court in thoroughly assessing this consideration on remand." (A 19).

Mr. Boima filed a motion to stay the Second Circuit's mandate on September 25, 2024, which the Second Circuit denied on October 10, 2024. On November 13, 2024, Mr. Boima filed an application with Justice Sotomayor asking her to recall and stay the Second Circuit's mandate pending the disposition of this petition for a writ of certiorari. That application remains pending.

On October 29, 2024, the government filed a motion to dismiss the pending complaint against Mr. Boima without prejudice. The district court granted that motion on November 1, 2024.

REASONS FOR GRANTING THE PETITION

I. The courts of appeal are in conflict over how to assess the "seriousness" of a crime for *Sell* purposes and this Court should decide this important question of federal law.

There are several conflicting schools of thought among the courts of appeal about how to determine whether a crime is "serious."

The Fourth, Fifth, Sixth, Seventh, and Eighth circuits have held that the statutory maximum of the charged federal offense controls, or is the primary factor in, determining whether a crime is "serious." *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005) ("We believe…it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes. Such an approach respects legislative judgments regarding the severity of the crime.") (citing *Blanton v. North Las Vegas*, 489 U.S. 538, 541-42 (1989)); *United States v. Tucker*, 60 F.4th 879, 887 (4th Cir. 2023) ("[T]he central consideration when determining whether a particular crime is serious enough to satisfy [the first *Sell* factor] is the 'maximum penalty authorized by statute.") (citing and quoting *United States v. Chatmon*, 718 F.3d 369, 374 (4th Cir. 2013)); *United States v. Palmer*, 507 F.3d 300, (5th Cir. 2007) (rejecting defendant's argument that guidelines range should be used to determine whether an offense is serious because "courts have…concluded that it is appropriate to consider the maximum penalty, rather than the sentencing guidelines range, in determining 'seriousness' in involuntary medication proceedings.") (citations omitted)); *United States v. Mikulich*, 732 F.3d 692, 696-97 (6th Cir. 2013) ("The Supreme Court did not define

what makes a crime 'serious' for the purposes of involuntary medication; however, this circuit looks to the maximum penalty authorized by statute. This objective measure not only respects the legislature's fundamental role in determining the seriousness of a particular type of criminal behavior, but also reduces the potential for arbitrariness inherent in the consideration of more subjective factors.") (citing *United States v. Green*, 532 F.3d 538, 547-48 (6th Cir. 2008)); *United States v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2014) ("To determine the seriousness of a crime…a majority of the circuits…analogize the Supreme Court's approach in the Sixth Amendment context, which looks to the statutory maximum penalty…There is logic in this approach, as the maximum statutory penalty reflects at least some measure of legislative judgment regarding the seriousness of a crime…when we are analyzing the objective seriousness of a crime for the purposes of *Sell*, we are not as concerned with the various factors that shape a reduced sentence, which are after the fact, subjective considerations.") (citations omitted)); *United States v. Fieste*, 84 F.4th 713, 720 (7th Cir. 2023) ("We evaluate the seriousness of an offense by looking to its statutory maximum penalty.") (citations omitted)); *United States v. Mackey*, 717 F.3d 569, 573-74 (8th Cir. 2013) (rejecting guidelines as a measure of "seriousness" and holding that, "[i]n determining the seriousness of the offense, we agree with those circuits that place the greatest weight on the maximum penalty authorized by statute as it is the most relevant objective indication of the seriousness with which society regards the offense.") (citations omitted)).

In contrast to these circuits, the Ninth Circuit holds that the probable

sentencing guidelines range applicable to a defendant's offense is the primary factor in determining the "seriousness" of the crime. *United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008) ("Although the sentencing guidelines no longer are mandatory, they are the best available predictor of the length of a defendant's incarceration…Accordingly, we disagree with the Fourth Circuit and conclude that the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness."); *United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014) ("To determine whether a crime is 'serious' enough to satisfy the first *Sell* factor, we first consider the likely Sentencing Guidelines range applicable to the defendant and then consider other relevant factors.") (citation omitted)).

Meanwhile, the Tenth Circuit and the Second Circuit have taken a more eclectic approach to assessing "seriousness." In *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007), the court said that "[w]hether a crime is 'serious' relates to the possible penalty the defendant faces if convicted as well as the nature or effect of the underlying conduct for which he was charged." Under this test, the Tenth Circuit looks to the statutory maximum penalty, the probable guidelines range, the defendant's criminal history, and the character of the allegations against the defendant to determine if an offense is "serious." *Valenzuela-Puentes*, 479 F.3d at 1226-27. And in *United States v. Boima*, 114 F.4th 69 (2024) the Second Circuit directed district courts to consider the statutory maximum, the probable guidelines range, the "nature and effect of the allegations leveled" against the defendant, as well as -- "to the extent reasonably ascertainable" – "the

individual facts of the case as they relate to the factors set forth in 18 U.S.C. § 3553(a)" when evaluating the "seriousness" of an offense. (A 1-23).

This confusion among the courts of appeal extends to the issue of what "special circumstances," *Sell*, 539 U.S. at 180, may be counted as diminishing the "seriousness" of an offense.

For example, in discussing factors that might diminish the seriousness of an offense, the *Sell* Court pointed to the "potential" that a defendant might be subject to civil commitment. 539 U.S. at 180. The Sixth Circuit has hewed to that standard: "And this takes us back to the Supreme Court's listing of the special circumstances that may lessen the importance of that interest and its articulation of one as the 'potential' for future civil confinement. The Supreme Court could have required a certainty of future civil confinement. It did not; so we should not." *United States v. Grigsby*, 712 F.3d 964, 972 (6th Cir. 2013).

In *Boima*, however, the Second Circuit instructed the district court to assess the "likelihood" of civil commitment rather than the mere "potential" for it. (A 18). The Eighth Circuit, meanwhile, has insisted on "a strong likelihood" of civil commitment before it will consider the prospect mitigating of an offense's seriousness. *Mackey*, 717 F.3d at 574. And the Fifth Circuit has gone still further, writing that, "it is not enough that [a defendant] could *potentially* be civilly committed; for the government's prosecutorial interest to be lessened meaningfully, [a defendant's] civil commitment would need to be *certain*." *United States v. James*, 959 F.3d 660, 664 (5th Cir. 2020) (emphasis in original)).

And, lastly on this point, it remains to be determined *who* bears the burden of proving that "special circumstances" sufficient to diminish the government's interest in prosecution exist. In *Boima*, the Second Circuit suggested that both the government and the defendant are responsible for bringing special circumstances to the district court's attention. (A 19). However, the Third, Sixth, and Seventh Circuits have all held that it is incumbent on the defendant to produce evidence of "special circumstances" adequate to lessen the "seriousness" of his offense. *United States v. Cruz*, 757 F.3d 372, (3rd Cir. 2014) ("We will thus adopt…the burden-shifting standard…Such adoption…clarifies the extent to which defendants bear responsibility for proving the existence of special circumstances…"); *United States v. Mikulich*, 732 F.3d 692, 697-99 (6th Cir. 2013) (noting that the defendant failed to produce evidence of "special circumstances" sufficient to overcome the government's interest in prosecution); *United States v. Fieste*, 84 F.4th 713, 721 (7th Cir. 2023) ("Asking the defendant to come forward with evidence of mitigating special circumstances recognizes the defendant's interest in bringing [those] special circumstances to light. The defendant not only has the best incentive to develop her individual circumstances that undermine the government's interest in prosecution, but she also is in the best position to know them in the first place.").

The courts of appeals, including the Second Circuit in *Boima*, have devised conflicting and inconsistent tests for what constitutes a "serious" crime warranting involuntary medication. Conflict and inconsistency surrounding an important issue of federal law is a sound reason for this Court to intervene and settle the matter.

A. This Second Circuit's decision in Mr. Boima's case conflicts with *Sell*'s caution that involuntary medication orders should be "rare," its demand that district courts consider the individual facts of a case in assessing "seriousness," and its remonstration that district courts should not conflate *Sell*'s analysis with analyses of involuntary medication applicable in contexts other than competency.

Sell recognizes that "an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs." 539 U.S. at 178 (citing and quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). "[O]nly an essential or overriding" governmental interest can overcome the individual's right to refuse antipsychotic medication. *Sell*, 539 U.S. at 178-79 (citing and quoting *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)). Therefore, "the Constitution permits the Government involuntarily to administer psychiatric drugs to a mentally ill defendant facing *serious* criminal charges, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Sell*, 539 U.S. at 179 (emphasis added).

Although this standard "will permit involuntary administration of drugs solely for trial competence purposes in certain instances," given its stringency this Court predicted "those instances may be rare." *Id*. at 180. And, in deciding whether a particular case presents a "rare" instance in which involuntary medication is warranted, "[c]ourts…*must* consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id*. (emphasis added).

The Second Circuit's decision in Mr. Boima's case is incompatible with *Sell* for several reasons.

First, the Second Circuit wrote that the eight-year statutory maximum faced by Mr. Boima, coupled with the nature of the charge against him, suggests the "seriousness" of his crime. (A 14). Similarly, it "deem[ed]" Mr. Boima's maximum probable guidelines range of 51-63 months sufficient to "suggest the seriousness of the offense." (A 16). However, this deeming of specific statutory maximums and guidelines ranges as suggesting a "serious" crime is tantamount to declaring those maximums and ranges "serious" as a matter of law, and thus inconsistent with *Sell*'s demand that the government's interest in prosecution should be assessed on a fact-specific, case-by-case basis. *Sell*, 539 U.S. at 178-80.

Further, these portions of the *Boima* opinion have the effect of making the government's prosecutorial interest presumptively "serious" in an inordinate number of cases. For example, the eight-year statutory maximum attached to Mr. Boima's Class D felony offense is lower than the statutory maximum for only one other class of federal felony. 18 U.S.C. § 3559. In other words, *Boima* suggests that four out of five classes of federal felony are presumptively "serious," exempting only Class E felonies and various misdemeanors and infractions from that judgment.

Moreover, comparing the United States Sentencing Commission's Second Circuit sentencing data for fiscal year 2023 with the Second Circuit's observations about Mr. Boima's statutory maximum and probable maximum guideline range shows that the mean sentences imposed for many crimes approach or exceed the number

of months the *Boima* Court deemed "serious." For example, in fiscal year 2023 in the Second Circuit, the mean sentence for assaults was 84 months, for drug trafficking crimes it was 58 months, and for robberies it was 75 months. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/2c23.pdf (last visited September 24, 2024). To be sure, it must be the case that *some* of these crimes were "serious" enough to warrant involuntary medication but presuming *all* of them so because of the penalties attached to them conflicts with *Sell*'s dictate that every offense should be treated as *sui generis* and involuntary medication orders should be "rare."

Second, the Second Circuit's opinion in *Boima* raises the evidentiary threshold for "special circumstances" to diminish the government's interest in prosecution, thereby making it even less likely that involuntary medication orders will be "rare."

For example, *Sell* says that the "potential" for civil commitment, by itself, "affects…the strength of the need for prosecution." 539 U.S. at 180. But in *Boima*, this Court repeatedly spoke of the "likelihood" of Mr. Boima's civil commitment as the mitigating factor for the district court to consider, and similarly wrote of the "*likelihood* that Boima will remain in custody pending deportation" as another mitigator. (A 18-20). But a "potential" is merely a possibility that something will happen, while a "likelihood" represents a probability that it will. https://www.merriam-webster.com/dictionary/potential; https://www.merriam-webster.com/dictionary/likelihood (both last visited September 24, 2024). The "likelihood" language in *Boima* is thus at odds with *Sell* and raises the bar to

diminishing the government's interest in prosecution.

Third, *Boima* departs from *Sell* insofar as it counsels that district courts "may" consider "readily ascertainable" facts about the individual case in determining whether a crime is "serious," but only "as they relate to the factors set forth in 18 U.S.C. 3553(a)" and to "the extent that such facts would be considered by a sentencing judge when weighing the § 3553(a) factors." (A 16-17). This permissive "may" language is incompatible with *Sell*'s dictate that district courts "must" consider the individual facts of the case when deciding whether the government's interest in prosecution is "serious" enough to warrant involuntary medication. *Sell*, 539 U.S. at 180.

Furthermore, *Sell* does not constrain the district courts to consider *only* those facts that "relate to" the section 3553(a) factors, nor does it tell them they may consider facts only "to the extent" that a sentencing judge would, and *Boima*'s instruction to the contrary unduly limits the district court's fact-finding and analysis. For one thing, there may be facts a district court should consider when evaluating "seriousness" that do not fit neatly within the categories or "factors" of section 3553(a). For another, the suitability of some of the section 3553(a) factors for use in a *Sell* analysis is questionable.

For instance, section 3553(a)(2)(D), which tells the district court to consider the need "to provide the defendant…with…medical care in the most effective manner" is not related to the only governmental interest with which *Sell* is concerned – "rendering the defendant *competent to stand trial*." 539 U.S. at 182 (emphasis in

original). Rather, consideration of this factor in the *Sell* contexts invites confusion between forced medication to restore competency and forced medication to address other, distinct concerns "related to the individual's dangerousness…or…related to the individual's own interests where refusal to take drugs puts his health gravely at risk." *Id.* In other words, consideration of this factor encourages district courts to conflate a *Harper*-type[3] analysis (dealing with danger to the self in an institutional context) or an 18 U.S.C. section 4246-type analysis (dealing with dangerousness to others or property) with the different analysis and focus dictated by *Sell*.

The Second Circuit's opinion in *Boima* conflicts with *Sell* by presumptively rendering a large swath of offenses "serious," heightening the threshold for mitigation of a crime's "seriousness," and constraining the district court's consideration of the facts of individual cases within a framework that may be under-inclusive, and which invites analytical confusion. This Court should intervene to correct the lower court's misapplication of *Sell*, and to clarify for the courts of appeals generally that *Sell* requires an individual, fact-specific evaluation of the "seriousness" of every case, an approach that may not be short-circuited by declaring certain statutory maximums or guidelines ranges presumptively "serious," or raising the evidentiary threshold for special circumstances to count as mitigating the government's interest in prosecution.

[3] *Washington v. Harper*, 494 U.S. 210 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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