No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2024

SAMUEL BOIMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION TO RECALL AND STAY MANDATE ADDRESSED TO CIRCUIT JUSTICE SOTOMAYOR

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APPLICATION TO RECALL AND STAY MANDATE ADDRESSED TO CIRCUIT JUSTICE SOTOMAYOR

Samuel Boima (Mr. Boima) respectfully applies for an order recalling and staying the mandate of the United States Court of Appeals for the Second Circuit pending the disposition of his forthcoming petition for a writ of certiorari, which is due to be filed in this Court on or before November 20, 2024.

I. Summary of the Factual and Procedural History[1]

Mr. Boima is a native of Sierra Leone who is subject to a final order of removal. *United States v. Boima*, 114 F.4th 69, 72 (2d Cir. 2024) (appended). While held at an immigration detention facility in Batavia, New York, he had an altercation with another detainee. *Id.* After immigration detention officers resolved the altercation and took Mr. Boima to a cell, it is alleged that he spit a mixture of saliva and blood at them, soiling both officers' uniforms and one officer's neck. *Id.* Mr. Boima's alleged conduct led to him being charged with assaulting federal officers, in violation of 18 U.S.C. section 111(a)(1).

[1] A more complete account may be found in the opinion of the Second Circuit in *United States v. Boima*, 114 F.4th 69 (2d Cir. 2024), which is appended to this application.

Several attempts were made to provide Mr. Boima with an initial appearance, but none were successful due to his bizarre and disruptive behavior. *Id*. Ultimately, a competency evaluation was ordered. *Id*. at 72-73. Mr. Boima was found incompetent and committed to the custody of the Attorney General to determine whether there was a substantial probability that he might attain competency in the foreseeable future. *Id*. at 73. A Bureau of Prisons forensic psychologist opined that there was a substantial probability, but only if Mr. Boima, who was diagnosed with schizophrenia, was administered antipsychotic medication. *Id*. at 73-74.

Mr. Boima refused to take antipsychotic medication voluntarily, so the Government sought a *Sell*[2] order authorizing it to involuntarily medicate him. *Id*. Although expressing skepticism about the seriousness of the charge against Mr. Boima and even urging the Government to withdraw the complaint, the District Court granted the Government's request. *Id*. at 74-75. Mr. Boima appealed, and the Second Circuit remanded with instructions to the District Court to make a finding

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

regarding the first *Sell* factor – whether Mr. Boima's alleged offense was "serious" enough to justify the involuntary administration of antipsychotic medication. *Id*. at 76-79.

On September 25, 2024, Mr. Boima filed a motion asking the Second Circuit to stay its mandate pending the preparation, filing, and disposition of a petition for a writ of certiorari. That motion was denied on October 10, 2024, and the Second Circuit's mandate issued forthwith. This application follows.

II. Standard to Recall and Stay a Mandate

An applicant for a stay must show that: 1) there is a "fair prospect" this Court will grant certiorari, 2) there is a "fair prospect" this Court will reverse the lower court's decision, and 3) there is a "likelihood" that he will suffer irreparable harm if a stay is denied. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (citing and quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (same) (Powell, J., in chambers).

For the following reasons, Mr. Boima's forthcoming petition for a writ of certiorari meets this standard.

III. There is a Fair Prospect the Petition Will be Granted and the Second Circuit's Judgment Reversed Because the Courts of Appeal are in Disarray Over the Test for What Constitutes a "Serious" Crime Within the Meaning of *Sell v. United States*, 539 U.S. 166 (2003). Moreover, the Second Circuit's Test for "Seriousness" Conflicts With *Sell*.

According to Supreme Court Rule 10(a), one important consideration guiding the decision whether to grant certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." And according to Rule 10(c), another salient consideration is whether "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In his forthcoming petition for a writ of certiorari, Mr. Boima intends to argue that the Second Circuit's decision in his case conflicts with the decisions of other courts of appeals regarding the appropriate test for a "serious" crime under *Sell* and conflicts with this Court's decision in *Sell v. United States*, 539 U.S. 166 (2003).

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

There are several 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.") (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) ("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' …however, this circuit looks to the maximum penalty authorized by statute.") (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…") (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) ("In determining the seriousness of the offense, we agree with those circuits that place the greatest weight on the maximum penalty authorized by statute...") (citations omitted)).

In contrast, 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…"); *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 and Second Circuits 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*, 2024 WL 3893059 at *5-6, 114 F.4th 69 (2d Cir. 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.

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. *Boima*, 114 F.4th 69, 79 (2d Cir. 2024). 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. Most circuits, including the Second Circuit, have not weighed in on this question. 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 and raises a "fair prospect" that four Justices will vote to do so.

B. The 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 anticipated that "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. *Boima*, 2024 WL 3893059 at *5. Similarly, it "deem[ed]" Mr. Boima's maximum probable guidelines range of 51-63 months sufficient to "suggest the seriousness of the offense." *Id.* 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 Second Circuit deemed "serious." For example, in fiscal year 2023, 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" by anyone's definition 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*, the Second Circuit 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. 114 F.4th at 79 (emphasis added). 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." *Boima*, 114 F.4th at 77-78.

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. 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

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

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. There is a "fair prospect" that five Justices will vote to reverse the Second Circuit's judgment.

IV. If This Court Does not Recall and Stay the Mandate, Mr. Boima Will Likely Suffer Irreparable Injury.

Finally, Mr. Boima will likely suffer irreparable injury if Your Honor does not recall and stay the Second Circuit's mandate.

The current direct appeal process, culminating in a petition for a writ of certiorari, represents Mr. Boima's opportunity to challenge the criteria by which the "seriousness" of his offense is evaluated. In the time it takes to prepare, file, and obtain a disposition on his petition for a writ of certiorari, absent a stay the district court will proceed on

remand, applying the "seriousness" criteria of the *Boima* opinion. And if a stay is not granted, on remand Mr. Boima is probably barred from arguing that the "seriousness" criteria articulated in the *Boima* opinion are erroneous, leaving him to argue only the correctness of the application of the Second Circuit's *Sell* analysis to his case. *United States v. Aquart*, 92 F.4th 77, 86-87 (2d Cir. 2024) (mandate rule, which is "a branch of the law-of-the-case doctrine…rigidly binds the district court, barring it from considering issues explicitly or implicitly decided on appeal.") (citing and quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) and *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006)).

And were the district court to again order involuntary medication, Mr. Boima's petition for a writ of certiorari might be moot. *United States v. Martin*, 974 F.3d 124, 140 (2d Cir. 2020) ("[A] case is moot when the issues presented are no longer 'live' or the part[y] lack[s] a legally cognizable interest in the outcome.") (citing and quoting *United States v. Suleiman*, 208 F.3d 32, 36 (2d Cir. 2000)). For although being involuntarily medicated pursuant to erroneous criteria would be an "actual injury traceable" to the government, once the medication is

administered it is arguable whether Mr. Boima's injury would "be likely to be redressed by a favorable judicial decision." *Martin*, 974 F.3d at 140 (citing and quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)).

In other words, absent a stay Mr. Boima may be involuntarily medicated based on an erroneous analytical framework, while at the same time losing his opportunity to challenge that result. Avoiding those irreparable injuries is "good cause" to recall the mandate and impose a stay.

CONCLUSION

For the foregoing reasons, Your Honor should recall and stay the mandate of the Second Circuit pending the preparation, filing, and disposition of Mr. Boima's petition for a writ of certiorari in this Court.

Respectfully submitted,

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DATED: October 21, 2024

APPENDIX

114 F.4th 69
United States Court of Appeals, Second Circuit.

UNITED STATES of America Appellee
v.
Samuel BOIMA Defendant-Appellant.

No. 23-6115
|
Argued: March 1, 2024
|
Decided: August 22, 2024

Synopsis

Background: After defendant was found incompetent to stand trial for felony assault on federal officers engaged in performance of official duties, government filed motion to involuntarily administer antipsychotic medication to restore defendant's competency. The United States District Court for the Western District of New York, David G. Larimer, J., 2023 WL 334339, granted the motion, and denied defendant's motion to stay the order, 2023 WL 1462852. Defendant appealed, and the Court of Appeals stayed the order.

[Holding:] The Court of Appeals held that in absence of any discussion, by District Court, of whether Government's asserted interest in prosecuting defendant was important, involuntary administration of antipsychotic medication could not be ordered.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (13)

[1] **Mental Health** Custody and Confinement

Whether the Government's asserted interest in prosecuting defendant is important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, is a legal question that is subject to de novo review, but factual findings relevant to this legal determination are reviewed for clear error.

[2] **Mental Health** Custody and Confinement

District Court's findings regarding three of the four factors from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, i.e., treatment will significantly further important government interests in trying defendant, treatment is necessary to further those interests considering any less intrusive alternatives, and treatment is medically appropriate, are factual in nature and are therefore subject to review for clear error.

[3] **Mental Health** Custody and Confinement

To grant authorization to involuntarily medicate a criminal defendant for restoration of competency to stand trial, a court must find that each of the four factors from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, have been satisfied.

[4] **Mental Health** Custody and Confinement

In absence of any discussion, by District Court, of whether Government's asserted interest in prosecuting defendant was important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, involuntary administration of antipsychotic medication could not be ordered, in prosecution for felony assault on federal officers engaged in performance of official duties; District Court merely noted that it had considered the directives and recommendations in *Sell* and in *Washington v. Harper*, 110 S.Ct. 1028, in which the Supreme Court addressed involuntary treatment of inmates with serious psychiatric illness who were dangerous to themselves or others. 18 U.S.C.A. § 111(a)(1, 2).

[5] **Mental Health** Custody and Confinement

When determining whether the Government's asserted interest in prosecuting defendant is important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, the seriousness of the charged offenses relates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which defendant was charged.

[6] **Mental Health** Custody and Confinement

Nature or effect of allegations leveled against defendant, in prosecution for assault on federal officers engaged in performance of official duties, relating to defendant's conduct as detainee awaiting deportation, implicated an important governmental interest in prosecuting defendant to protect through application of criminal law the basic human need for security, for purposes of determining whether Government's asserted interest in prosecuting defendant was important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial. 18 U.S.C.A. § 111(a)(1, 2).

[7] **Mental Health** Custody and Confinement

When determining whether the Government's asserted interest in prosecuting defendant is important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, District Courts should consider a potential Sentencing Guidelines range in assessing the seriousness of an offense, provided that such a range can be assessed to some reasonable degree of reliability at the early point at which many *Sell* assessments are likely to occur. U.S.S.G. § 1B1.1 et seq.

[8] **Mental Health** Custody and Confinement

Potential Sentencing Guidelines range of 51 to 63 months suggested that the charged felony offense of assault on federal officers engaged in performance of official duties was a serious offense, for purposes of determining whether the Government's asserted interest in prosecuting defendant was important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial. 18 U.S.C.A. § 111(a)(1, 2); U.S.S.G. § 1B1.1 et seq.

[9] **Mental Health** Custody and Confinement

When determining whether the Government's asserted interest in prosecuting defendant is important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, the court may consider the statutory maximum and mandatory minimum sentences, the likely Sentencing Guidelines range faced by the defendant, and, to the extent reasonably ascertainable, the individual facts of the case as they relate to the statutory sentencing factors, and in particular, a court should consider the nature or effect of the underlying conduct. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq.

[10] **Mental Health** Custody and Confinement

The nature or effect of the underlying conduct, as a reflection of the seriousness of the charged offense, was an appropriate consideration when determining whether Government's asserted interest in prosecuting defendant was important, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, in prosecution for felony assault on federal officers engaged in performance of official duties, relating to defendant's conduct as detainee awaiting deportation; defendant allegedly spat a mixture of saliva and blood on the uniforms of two officers and on bare neck of one officer, and it could be argued that defendant's conduct posed not only a risk of disease transmission but also a threat to authority of corrections officers in detention facility. 18 U.S.C.A. § 111(a)(1, 2).

[11] **Mental Health** Custody and Confinement

Even for a serious crime, special circumstances may lessen the importance of the governmental interest in bringing a defendant to trial, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, and special circumstances include the likelihood of civil confinement, which may diminish the risks associated with releasing defendant, as well as a long delay in bringing defendant to trial, which creates the possibility that defendant has already been confined for a significant amount of time for which he would receive credit toward any sentence ultimately imposed. 18 U.S.C.A. §§ 3585(b), 4246(a).

and parties proffered estimates of Sentencing Guidelines ranges as low as 27 to 33 months or as high as 51 to 63 months. 18 U.S.C.A. § 3585(b); U.S.S.G. § 1B1.1 et seq.

[12] **Mental Health** Custody and Confinement

It was appropriate to evaluate, as special circumstance that might lessen the importance of Government's interest in prosecuting defendant, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial, the likelihood that defendant would remain in custody pending deportation if he was not forcibly medicated with antipsychotic medication and brought to trial for felony assault on federal officers engaged in performance of official duties, relating to defendant's conduct as detainee awaiting deportation; remaining in custody could diminish the risks normally attendant to forgoing the prosecution of someone charged with a serious offense.

[13] **Mental Health** Custody and Confinement

It was appropriate to consider, as special circumstance that might lessen the importance of Government's interest in prosecuting defendant, the substantial period of time that had passed since defendant was charged with felony assault on federal officers engaged in performance of official duties, as factor from Supreme Court's decision in *Sell v. United States*, 123 S.Ct. 2174, for authorization to involuntarily medicate a defendant for restoration of competency to stand trial; four years had elapsed since filing of criminal complaint, defendant had not yet been indicted, he would receive credit, for pretrial confinement, toward any sentence ultimately imposed,

Appeal from the United States District Court for the Western District of New York, David G. Larimer, *J.*

Attorneys and Law Firms

For Defendant-Appellant: Martin J. Vogelbaum, Assistant Federal Public Defender, Buffalo, New York.

For Appellee: Sean Eldridge, Assistant United States Attorney (Tiffany H. Lee, Assistant United States Attorney, on the brief), for Trini E. Ross, United States Attorney, Western District of New York, Buffalo, New York.

Before: Livingston, Chief Judge, Sullivan, and Menashi, Circuit Judges.

Opinion

Per Curiam:

***72** Defendant-Appellant Samuel Boima appeals from a January 19, 2023 order of the United States District Court for the Western District of New York (Larimer, *J.*) granting the government's motion forcibly to administer antipsychotic medication to render Boima competent to stand trial. On appeal, Boima argues that the district court failed to make the first of the four findings required to issue such an order under *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003): that the government has an important interest in his prosecution. Boima further contends that the government lacks such an interest, foreclosing his involuntary medication. For the reasons set forth herein, we agree with Boima that the order authorizing his forced medication does not reflect a determination by the district court that important governmental interests are at stake in his prosecution. Accordingly, we VACATE the order and REMAND so that the district court may in the

first instance conduct the requisite analysis consistent with this opinion.

I. BACKGROUND

A. The Complaint and Initial Appearance

On July 20, 2020, the government filed a criminal complaint accusing Boima, a native and citizen of Sierra Leone, of assaulting two officers at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York, where he was detained pending deportation pursuant to a final order of removal. The complaint alleges that on May 25, 2020, the officers responded to an altercation between Boima and another detainee. Boima became "actively resistant and verbally combative" when the officers handcuffed and escorted him to the Special Housing Unit ("SHU"), where he was to be held pending an investigation. App'x 16. When the officers placed Boima in a cell in the SHU, ordered him to remain on the bunk until they exited, and then turned to leave, Boima spat a mixture of saliva and blood on one officer's uniform jacket and duty belt, and on the other's uniform shirt, pants, duty belt, and bare neck. The officers secured Boima's cell door "without further incident." App'x 16.

The complaint charges an assault on federal officers engaged in the performance of official duties, in violation of 18 U.S.C. § 111(a)(1). The charge is a Class D felony that carries a statutory maximum sentence of eight years' imprisonment. 18 U.S.C. § 111(a)(2).

Boima was first scheduled to appear on the complaint on July 27, 2020, but the date of his first appearance was repeatedly scheduled and rescheduled by the court (Payson, *M.J.*) because Boima refused to cooperate with efforts to bring him from BFDF to the federal courthouse in Rochester, New York. At the fourth scheduled initial appearance, on August 10, 2020, Boima appeared by video. Boima immediately began to rant—alleging false imprisonment, adamantly denying that criminal charges were pending against him or that he was represented by his counsel of record, and concluding that "I need you -- the family members involved that want money or whatever amount of money that they spent on this situation [--] I need ya'll to leave me alone and stop touching me." App'x 46. Magistrate Judge Payson noted that she had "never encountered any defendant who has been so resistant and noncooperative with an initial appearance." App'x 59. On August 14, after providing notice to the parties and an opportunity to submit information to the court, she ordered a psychological examination pursuant ***73** to 18 U.S.C. § 4241(a) to determine Boima's competency to stand trial. Boima was removed from immigration custody and admitted to the Metropolitan Correctional Center ("MCC"), a federal detention facility in New York City.

B. Competency Examination and Hearing

After receiving an evaluation report from Dr. Kari Schlessinger, who was a forensic psychologist at the MCC before becoming chief psychologist at the Metropolitan Detention Facility in Brooklyn, New York in 2021, Magistrate Judge Payson conducted a competency hearing on June 2, 2021. In her report, Dr. Schlessinger noted that Boima, throughout his detention at the MCC, was "generally uncooperative" and "often illogical and highly agitated." App'x 116. She testified at the hearing that Boima presented as "psychotic with paranoid features" and that he "didn't believe that he had a court case, rather he believed he had been kidnapped." App'x 100. Although unable to diagnose him with a specific psychotic disorder as a result, *inter alia*, of his "guarded and evasive demeanor," Dr. Schlessinger assessed in her report that Boima appeared to be "actively psychotic" with "unspecified schizophrenia spectrum and other psychotic disorder." App'x 115–16. Dr. Schlessinger concluded in both her report and her testimony that Boima was not competent to stand trial.[1]

Based on Dr. Schlessinger's testimony, Magistrate Judge Payson issued a Report and Recommendation concluding that the district court should find Boima incompetent to stand trial. The magistrate judge recommended committing Boima to Federal Bureau of Prisons ("BOP") custody for a period not to exceed four months to determine "whether there is a substantial probability that in the foreseeable future" he would return to competency. App'x 118–19 (citing 18 U.S.C. § 4241(d)(1)). Neither party objected, and the district

court (Larimer, *J.*) issued a Decision and Order in July 2021 that adopted the Report and Recommendation and found Boima incompetent to stand trial. The district court ordered Boima hospitalized for an assessment of whether he might attain the capacity to stand trial. As a result, Boima was admitted to the Federal Medical Center in Butner, North Carolina ("FMC Butner") on December 21, 2021.

C. The *Sell* Proceedings

Dr. Kristina P. Lloyd, a forensic psychologist at FMC Butner, submitted a forensic evaluation to the district court in March 2022. Her report diagnosed Boima with schizophrenia.[2] Dr. Lloyd opined that Boima remains incompetent to stand trial, but that "a substantial probability exists" that psychotropic medication—to which Boima will not agree—would restore his competence. SD 23. Dr. Lloyd noted, accurately, that pursuant to *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), a district court is required to determine, *inter alia*, whether important governmental interests are at stake in bringing a criminal defendant to trial before ordering his involuntary medication ***74** to restore competency. In the event that the court determined that additional efforts should be made to restore Boima's competency to stand trial, Dr. Lloyd noted that "we would request the court order treatment with psychotropic medication on an involuntary basis." SD 23.

The district court, in a letter dated May 17, 2022, urged the Assistant United States Attorney in charge of Boima's prosecution to "consider withdrawing the complaint against Mr. Boima." App'x 370. In the letter, which was also provided to Boima's counsel, the district court stated that the assault on the officers 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." App'x 370. The letter noted that the charges against Boima had been lodged almost two years earlier and that, at this point, the government's interest in continuing the prosecution was "quite low."[3] App'x 370–71.

The government, however, did not withdraw the complaint, but moved for a *Sell* hearing. The hearing began on June 29, 2022,[4] and continued on September 27, 2022. At the outset, defense counsel asked the court to rule on the "threshold legal question" of whether the government had a sufficiently strong interest in prosecuting Boima. App'x 166. The court declined at that stage, explaining: "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." App'x 167.

The government called Dr. Lloyd, who testified regarding the forensic evaluation she had submitted to the court in March. Dr. Lloyd diagnosed Boima with schizophrenia and assessed that he could be restored to competency with psychiatric medication. She calculated that this might take about five and a half months, App'x 209, but that given his refusal to undertake treatment voluntarily, absent *Sell* there is "no other way to restore him to competency," App'x 213. The government also called Dr. Charles Cloutier, a staff psychiatrist at FMC Butner, and introduced his report dated July 19, 2022. Dr. Cloutier testified that he also diagnosed Boima with schizophrenia and that Boima requires medication to be restored to competency. Dr. Cloutier estimated the treatment timeframe as four to eight months.

Near the conclusion of the hearing, in response to a question from the court, the government indicated that in the event it dismisses the charge against Boima in light of his inability to stand trial, "there is a mechanism for civil commitment." App'x 349. The government nonetheless conceded that "I don't know what would happen with that. I don't know if he would be civilly committed. ... I don't even know if there would be a proceeding that would [be] undertaken." App'x 349.

***75** D. *Sell* Order

On January 19, 2023, the district court issued a decision and order granting the government's motion to administer antipsychotic medication to Boima to restore him to competency—and to do so forcibly if he refused to take the medication voluntarily. The court noted that based on the medical opinions of Drs. Lloyd and Cloutier, "there is a substantial probability that with appropriate antipsychotic medication, whether voluntarily

taken or involuntarily administered, Boima would be restored to competency to face the pending charge, [and] the medication would treat Boima's significant mental illness." App'x 385. The court noted that "[b]oth Dr. Lloyd and Dr. Cloutier testified that there were some side effects connected with such antipsychotic medication, but that those side effects could be monitored and treated." App'x 384–85. And "there is virtually no chance," the court concluded, "that Boima would be restored to competency" without medication. App'x 385. The court did not address the government's interest in prosecuting Boima, other than to note that the court had "considered the directives and recommendations" of *Sell* and *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).[5] App'x 384.

On February 2, 2023, the district court denied Boima's motion to stay the court's order. Boima filed a timely notice of appeal. On April 5, 2023, this Court issued a stay of the *Sell* order.

II. DISCUSSION

[1] [2] [3]The Supreme Court in *Sell* "held that the Government may involuntarily medicate a mentally ill defendant to render him competent for trial if: [i] there are important governmental interests in trying the individual; [ii] the treatment will significantly further those interests; [iii] the treatment is necessary to further those interests, considering any less intrusive alternatives; and [iv] the treatment is medically appropriate." *United States v. Gomes*, 387 F.3d 157, 159–60 (2d Cir. 2004) [hereinafter "*Gomes II*"] (discussing *Sell*); *see United States v. Magassouba*, 544 F.3d 387, 396 (2d Cir. 2008) (noting that the Supreme Court held in *Sell* that an incompetent defendant "may be involuntarily medicated for the sole purpose of rendering him competent to stand trial only if [the] four criteria are satisfied"). The first of the four *Sell* factors, "[w]hether the Government's asserted interest is important[,] is a legal question that is subject to *de novo* review."[6] *Gomes II*, 387 F.3d at 160. "The district court's findings with respect to the other *Sell* factors are factual in nature and are therefore subject to review for clear error." *Id.* (citing *Benjamin v. Fraser*, 343 F.3d 35, 43 (2d Cir. 2003)). *Sell* directs that a court "must find" each of the four factors satisfied to order a defendant involuntarily medicated to restore his competency to stand trial. 539 U.S. at 180–81, 123 S.Ct. 2174. And this Court has held that the government bears ***76** the burden of proof to establish each factor by "clear and convincing evidence." *Gomes II*, 387 F.3d at 160.

[4]Here, the district court's order omits any discussion of *Sell*'s first factor, which requires that "a court must find that *important* governmental interests are at stake" before ordering involuntary treatment for the sole purpose of rendering a mentally ill defendant competent for trial. *Sell*, 539 U.S. at 180, 123 S.Ct. 2174 (emphasis in original). To be sure, the court's order does provide analysis that would support affirmative findings as to the latter three *Sell* factors. But it says nothing at all about the governmental interest supporting involuntary medication – an interest that the district court itself had suggested in its May 17, 2022 letter was "quite low." App'x 371. Because we vacate the district court's order for lack of the requisite finding as to *Sell*'s first factor, we need not reach Boima's argument that the government's interest in prosecuting him is insufficient to justify involuntary medication. But because the issue is likely to arise on remand, we offer some guidance to the district court regarding the proper framework that it, in the first instance, is to apply.

* * *

After affirming that a court must find important governmental interests at stake to authorize forced medication for the purpose of restoring a criminal defendant to competency, the *Sell* Court noted that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important," whether the offense "is a serious crime against the person or a serious crime against property." 539 U.S. at 180, 123 S.Ct. 2174. It cautioned, however, that "[c]ourts ... must consider the facts of the individual case in evaluating the Government's interest in prosecution," noting that "[s]pecial circumstances may lessen the importance of that interest":

> The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill – and that would diminish the risks that ordinarily attach to freeing

> without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b)).

Id.

[5] [6]As the Tenth Circuit said in *United States v. Valenzuela-Puentes*, "[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." 479 F.3d 1220, 1226 (10th Cir. 2007). Here, Boima faces trial on the charge of assaulting federal officers engaged in the performance of their official duties—a crime for which a defendant may be sentenced to up to eight years in prison. The seriousness of this crime is suggested *both* by the penalty to which Boima would be exposed upon conviction, *see Gomes II*, 387 F.3d at 160 (noting that "the seriousness of the crime ... [is] evident from the substantial sentence Gomes faces if convicted" (quoting ***77** *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2002) [hereinafter "*Gomes I*"], *cert. granted*, *judgment vacated on other grounds*, 539 U.S. 939, 123 S.Ct. 2605, 156 L.Ed.2d 625 (2003))); *see also United States v. Palmer*, 507 F.3d 300, 304 (5th Cir. 2007) (noting that "courts [have] held that crimes authorizing punishments of over six months are 'serious' "); *Evans,* 404 F.3d at 237–38 (concluding that the government had an important interest in trying a defendant charged with a felony carrying a maximum term of ten years), *and* by the nature or effect of the allegations leveled against Boima, which surely implicate an important governmental interest in "protect[ing] through application of the criminal law the basic human need for security," *Sell*, 539 U.S. at 180, 123 S.Ct. 2174 (citation omitted).

[7] [8]Boima argues that his probable sentencing range under the U.S. Sentencing Guidelines ("Guidelines") is substantially less than eight years—assuming a "worst-case" scenario of perhaps 51 to 63 months' imprisonment. Appellant's Br. at 48. We agree with Boima that district courts should properly consider a potential Guidelines range in assessing the seriousness of an offense for these purposes, provided that such a range can be assessed to some reasonable degree of reliability at the early point at which many *Sell* assessments are likely to occur. *See Gomes I*, 289 F.3d at 86 ("It is appropriate for the district court to consider the sentence likely to be imposed in fact rather than the statutory maximum alone.");[7] *see also United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008) ("While the statutory maximum may be more readily ascertainable, any difficulty in estimating the likely [G]uideline[s] range exactly is an insufficient reason to ignore *Sell*'s direction that courts should consider the specific circumstances of individual defendants in determining the seriousness of a crime."). That said, we deem a Guidelines range of 51 to 63 months to itself suggest the seriousness of the offense. *See United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014) (considering a crime to be serious based on a Guidelines range of 33 to 41 months and the underlying conduct of making "lurid and distressing threats" against government employees and officials); *Valenzuela-Puentes*, 479 F.3d at 1226 ("We consider a maximum sentence of twenty years and a likely [G]uideline[s] sentence of six to eight years sufficient to render the underlying crime 'serious.' ").

[9] [10]In addition to the statutory maximum, mandatory minimum, and likely Guidelines range faced by the defendant, a judge may also 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). *See Gall v. United States*, 552 U.S. 38, 49–50, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). In particular, the district court should consider "the nature or effect of the underlying conduct," *Valenzuela-Puentes*, 479 F.3d at 1226; *see Gillenwater*, 749 F.3d at 1101, including here the fact that Boima is alleged to have spat "a mixture of saliva and blood" on the uniforms of both officers and on the bare neck of one, App'x 16. Although the district court below observed that "no serious injuries occurred," App'x at 370,[8] it could be argued that Boima's ***78** conduct posed not only a risk of disease transmission but also a threat to the authority of corrections officers in the detention facility. To the extent that such facts would be considered by a sentencing judge when weighing the § 3553(a) factors, they should also be considered when assessing whether the alleged crime is serious enough to establish an important government interest in prosecution. *See Gillenwater*, 749 F.3d at 1101.

[11]Of course, the district court on remand must consider not only the seriousness of the crime charged in making a determination on the first *Sell* factor, but also countervailing considerations that may diminish the governmental interest in moving forward with this prosecution. *See Hernandez-Vasquez*, 513 F.3d at 918 (noting that "common to each of the appellate decisions interpreting *Sell* is a recognition that courts must consider the facts of individual cases in evaluating the government's interest in prosecution"). Even for a serious crime, "[s]pecial circumstances may lessen the importance" of the governmental interest in bringing a defendant to trial. *Sell*, 539 U.S. at 180, 123 S.Ct. 2174. *Sell* provides several examples of such circumstances, including the likelihood of civil confinement, which may diminish the risks associated with releasing someone charged with an offense, and a long delay in bringing someone to trial, which creates "the possibility that the defendant has already been confined for a significant amount of time [ ]for which he would receive credit toward any sentence ultimately imposed ...." *Id.* (citing 18 U.S.C. § 3585(b)).

In evaluating the governmental interest at stake in Boima's prosecution on remand, the district court should assess the likelihood that Boima may be civilly committed. The likelihood of such commitment may have increased since this matter was first before the district court, as the government has recently filed a certificate of mental disease or defect and dangerousness pursuant to 18 U.S.C. § 4246(a) with the United States District Court for the Eastern District of North Carolina, making possible Boima's commitment if he does not stand trial.[9] To be sure, the prospect of civil commitment is not determinative. *Sell*, 539 U.S. at 180, 123 S.Ct. 2174 ("We do not mean to suggest that civil commitment is a substitute for a criminal trial."). But such a prospect may reduce the governmental interest at stake by "diminish[ing] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* Both the government and defense counsel should be prepared to assist the district court in thoroughly assessing this consideration on remand.

[12]The district court should similarly evaluate the likelihood that Boima will remain in custody pending deportation in the event that he is not forcibly medicated and brought to trial. This consideration, too, may affect the government's interest in ***79** bringing him to trial by diminishing the risks normally attendant on forgoing the prosecution of someone charged with a serious offense.

[13]The district court should also consider the substantial period that has passed since these charges were first brought when evaluating the government's interest in bringing Boima to trial. Four years have elapsed since the filing of the criminal complaint in July 2020, and Boima, who remains in confinement, has not yet been indicted on the charge lodged in that complaint. *Sell* affirms that pretrial confinement may mitigate the government's prosecutorial interest where a "defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b))." *Sell*, 539 U.S. at 180, 123 S.Ct. 2174. The parties proffer estimates of Boima's Guidelines range that, assuming a criminal history category of VI, are as low as 27 to 33 months or as high as 51 to 63 months, depending on factors such as acceptance of responsibility following a plea agreement and whether Boima qualifies as a career offender. Appellant's Br. at 47–48; *see* Appellee's Br. at 19 (citing Appellant's Br. at 47–48); U.S.S.G. § 5A (Sentencing Table). Were Boima's case to result in a conviction and reach the sentencing stage, the

district court presumably would credit the four years of pretrial detention Boima has already served—plus additional time accrued by that date—toward the sentence. *See Sell*, 539 U.S. at 180, 123 S.Ct. 2174 (citing 18 U.S.C. § 3585(b)). This period would also potentially include the time needed to restore Boima to competency, which the experts estimate could take between four and eight months, as well as the time required for plea or trial proceedings and sentencing.

On remand, the district court should consider these special circumstances in evaluating the first *Sell* factor. Open questions remain regarding whether Boima will face civil commitment, release, or immigration custody pending deportation if not brought to trial in this case. The district court must consider the likelihood of these events occurring, as a low or moderate probability may limit or defeat their potential mitigating effects on the strength of the governmental interest in prosecution. *Cf. Gomes II*, 387 F.3d at 161 (assessing that "we need not consider how the potential for civil commitment impacts this case" because "[t]here is little, if any, evidence on the record to suggest that Gomes would qualify for civil commitment"). The court must also consider how time served and the additional time necessary for treatment and future proceedings relate to the potential sentence Boima faces, if convicted. These considerations are not exhaustive; the district court may ascertain that changes with the passage of time raise additional considerations. This Court takes no position on the resolution of these questions at the present stage.

III. CONCLUSION

For the foregoing reasons, we VACATE the order permitting Boima's involuntary medication and REMAND for further proceedings consistent with this opinion.

All Citations

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Footnotes

1 She further indicated that "spontaneous remission" was "very unlikely" without psychotropic medication, but that Boima was unlikely to take such medication voluntarily. App'x 108–09. In her report, she also indicated that she could not rule out whether Boima was suffering from Post Traumatic Stress Disorder ("PTSD").

2 She also noted that while "it is possible Mr. Boima meets the criteria for [PTSD], his inability and unwillingness to participate in interviews or testing makes it difficult to determine [i]f this diagnosis is correct." SD 22.

3 The district court specifically observed that in the event of an application pursuant to *Sell*, "[a] hearing will take time, perhaps many months, and Boima remains detained for an excessive period of time. I suspect that if such an application is made, he will be in custody many months, perhaps years longer than [what] the guideline sentence might be for one who is convicted of spitting at a prison guard." App'x 371.

4 The hearing transcript records the date as June 29, 2020. *See* App'x 159; *see also* Appellant's Br. at 17. However, the 2020 year appears to be error. *See* Appellee's Br. at 8 (referring to June 29, 2022, as the first date of the *Sell* hearing); Hearing Transcript at App'x 166 (transcribing defense counsel expressing

that Boima had already been detained for approximately two years on the instant offense).

[5] *Harper* addresses the involuntary treatment of inmates with a serious mental illness who are dangerous to themselves or others, where treatment is in the inmate's medical interest. *See* 494 U.S. at 236, 110 S.Ct. 1028. The Supreme Court in *Sell* observed that "[a] court need not consider" whether involuntary medication is permissible to render a defendant competent for trial "if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness." 539 U.S. at 181–82, 123 S.Ct. 2174 (emphasis in original). Significantly, the government has not argued, nor does the record support, that the *Harper* criteria are satisfied in this case.

[6] We agree with the Fourth Circuit that factual findings relevant to this legal determination are reviewed for clear error. *United States v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005).

[7] Even though *Gomes I* was vacated and remanded for further consideration in light of *Sell*, we held in *Gomes II* that "nothing" in *Sell* undermines the persuasive reasoning of *Gomes I* that courts may consider the "sentence [a defendant] faces if convicted." *Gomes II*, 387 F.3d at 160 (quoting *Gomes I*, 289 F.3d at 86).

[8] Had injuries occurred, Boima would likely be facing a statutory maximum of twenty years instead of eight years. *See* 18 U.S.C. § 111(b) ("Whoever, in the commission of any acts described in [18 U.S.C. § 111(a)], ... inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.").

[9] Section 4246(a) provides for the commitment of an individual against whom charges have been dismissed "solely for reasons related to the mental condition of the person" if he or she suffers from a mental disease or defect for which "release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. § 4246(a). Dr. Lloyd noted in her initial report that Boima could be evaluated for commitment under this provision. *See* Report of Dr. Lloyd, SD 24. ("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.").

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of August, two thousand twenty-four.

Before: Debra Ann Livingston,
Chief Judge,
Richard J. Sullivan,
Steven J. Menashi,
Circuit Judges.

United States of America,

Appellee,

v.

Samuel Boima,

Defendant - Appellant.

JUDGMENT

Docket No. 23-6115

The appeal in the above captioned case from an order of the United States District Court for the Western District of New York was argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order is VACATED and the case is REMANDED for further proceedings consistent with this Court's opinion.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 10/10/2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2023

(Argued: March 1, 2024 Decided: August 22, 2024)

No. 23-6115

UNITED STATES OF AMERICA

Appellee

-v.-

SAMUEL BOIMA

Defendant-Appellant.

Before: LIVINGSTON, Chief Judge, SULLIVAN, and MENASHI, Circuit Judges.

Defendant-Appellant Samuel Boima ("Boima") appeals from an order authorizing the Bureau of Prisons forcibly to medicate him to restore his competency to stand trial on the charge that he assaulted federal officers engaged in the performance of official duties, in violation of 18 U.S.C. § 111(a)(1). After finding Boima incompetent to stand trial, the United States District Court for the Western District of New York, David G. Larimer, *J.*, ordered the involuntary administration of psychotropic medication to Boima to restore his competency. Because the district court failed to consider and make a finding as to all four factors

in *Sell v. United States*, 539 U.S. 166 (2003), the district court's order is vacated and the matter is remanded for further proceedings consistent with this opinion.

FOR DEFENDANT-APPELLANT: MARTIN J. VOGELBAUM, Assistant Federal Public Defender, Buffalo, New York.

FOR APPELLEE: SEAN ELDRIDGE, Assistant United States Attorney (Tiffany H. Lee, Assistant United States Attorney, *on the brief*), for Trini E. Ross, United States Attorney, Western District of New York, Buffalo, New York.

PER CURIAM:

Defendant-Appellant Samuel Boima appeals from a January 19, 2023 order of the United States District Court for the Western District of New York (Larimer, *J.*) granting the government's motion forcibly to administer antipsychotic medication to render Boima competent to stand trial. On appeal, Boima argues that the district court failed to make the first of the four findings required to issue such an order under *Sell v. United States*, 539 U.S. 166 (2003): that the government has an important interest in his prosecution. Boima further contends that the government lacks such an interest, foreclosing his involuntary medication. For the reasons set forth herein, we agree with Boima that the order authorizing his forced medication does not reflect a determination by the district court that important governmental interests are at stake in his prosecution. Accordingly, we VACATE

the order and REMAND so that the district court may in the first instance conduct the requisite analysis consistent with this opinion.

I. BACKGROUND

A. The Complaint and Initial Appearance

On July 20, 2020, the government filed a criminal complaint accusing Boima, a native and citizen of Sierra Leone, of assaulting two officers at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York, where he was detained pending deportation pursuant to a final order of removal. The complaint alleges that on May 25, 2020, the officers responded to an altercation between Boima and another detainee. Boima became "actively resistant and verbally combative" when the officers handcuffed and escorted him to the Special Housing Unit ("SHU"), where he was to be held pending an investigation. App'x 16. When the officers placed Boima in a cell in the SHU, ordered him to remain on the bunk until they exited, and then turned to leave, Boima spat a mixture of saliva and blood on one officer's uniform jacket and duty belt, and on the other's uniform shirt, pants, duty belt, and bare neck. The officers secured Boima's cell door "without further incident." App'x 16.

The complaint charges an assault on federal officers engaged in the performance of official duties, in violation of 18 U.S.C. § 111(a)(1). The charge is a

Class D felony that carries a statutory maximum sentence of eight years' imprisonment. 18 U.S.C. § 111(a)(2).

Boima was first scheduled to appear on the complaint on July 27, 2020, but the date of his first appearance was repeatedly scheduled and rescheduled by the court (Payson, *M.J.*) because Boima refused to cooperate with efforts to bring him from BFDF to the federal courthouse in Rochester, New York. At the fourth scheduled initial appearance, on August 10, 2020, Boima appeared by video. Boima immediately began to rant—alleging false imprisonment, adamantly denying that criminal charges were pending against him or that he was represented by his counsel of record, and concluding that "I need you -- the family members involved that want money or whatever amount of money that they spent on this situation [--] I need ya'll to leave me alone and stop touching me." App'x 46. Magistrate Judge Payson noted that she had "never encountered any defendant who has been so resistant and noncooperative with an initial appearance." App'x 59. On August 14, after providing notice to the parties and an opportunity to submit information to the court, she ordered a psychological examination pursuant to 18 U.S.C. § 4241(a) to determine Boima's competency to stand trial. Boima was removed from immigration custody and admitted to the

Metropolitan Correctional Center ("MCC"), a federal detention facility in New York City.

B. Competency Examination and Hearing

After receiving an evaluation report from Dr. Kari Schlessinger, who was a forensic psychologist at the MCC before becoming chief psychologist at the Metropolitan Detention Facility in Brooklyn, New York in 2021, Magistrate Judge Payson conducted a competency hearing on June 2, 2021. In her report, Dr. Schlessinger noted that Boima, throughout his detention at the MCC, was "generally uncooperative" and "often illogical and highly agitated." App'x 116. She testified at the hearing that Boima presented as "psychotic with paranoid features" and that he "didn't believe that he had a court case, rather he believed he had been kidnapped." App'x 100. Although unable to diagnose him with a specific psychotic disorder as a result, *inter alia*, of his "guarded and evasive demeanor," Dr. Schlessinger assessed in her report that Boima appeared to be "actively psychotic" with "unspecified schizophrenia spectrum and other

psychotic disorder." App'x 115–16. Dr. Schlessinger concluded in both her report and her testimony that Boima was not competent to stand trial.[1]

Based on Dr. Schlessinger's testimony, Magistrate Judge Payson issued a Report and Recommendation concluding that the district court should find Boima incompetent to stand trial. The magistrate judge recommended committing Boima to Federal Bureau of Prisons ("BOP") custody for a period not to exceed four months to determine "whether there is a substantial probability that in the foreseeable future" he would return to competency. App'x 118–19 (citing 18 U.S.C. § 4241(d)(1)). Neither party objected, and the district court (Larimer, *J.*) issued a Decision and Order in July 2021 that adopted the Report and Recommendation and found Boima incompetent to stand trial. The district court ordered Boima hospitalized for an assessment of whether he might attain the capacity to stand trial. As a result, Boima was admitted to the Federal Medical Center in Butner, North Carolina ("FMC Butner") on December 21, 2021.

[1] She further indicated that "spontaneous remission" was "very unlikely" without psychotropic medication, but that Boima was unlikely to take such medication voluntarily. App'x 108–09. In her report, she also indicated that she could not rule out whether Boima was suffering from Post Traumatic Stress Disorder ("PTSD").

C. The *Sell* Proceedings

Dr. Kristina P. Lloyd, a forensic psychologist at FMC Butner, submitted a forensic evaluation to the district court in March 2022. Her report diagnosed Boima with schizophrenia.[2] Dr. Lloyd opined that Boima remains incompetent to stand trial, but that "a substantial probability exists" that psychotropic medication—to which Boima will not agree—would restore his competence. SD 23. Dr. Lloyd noted, accurately, that pursuant to *Sell v. United States*, 539 U.S. 166 (2003), a district court is required to determine, *inter alia*, whether important governmental interests are at stake in bringing a criminal defendant to trial before ordering his involuntary medication to restore competency. In the event that the court determined that additional efforts should be made to restore Boima's competency to stand trial, Dr. Lloyd noted that "we would request the court order treatment with psychotropic medication on an involuntary basis." SD 23.

The district court, in a letter dated May 17, 2022, urged the Assistant United States Attorney in charge of Boima's prosecution to "consider withdrawing the complaint against Mr. Boima." App'x 370. In the letter, which was also provided

[2] She also noted that while "it is possible Mr. Boima meets the criteria for [PTSD], his inability and unwillingness to participate in interviews or testing makes it difficult to determine [i]f this diagnosis is correct." SD 22.

to Boima's counsel, the district court stated that the assault on the officers 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." App'x 370. The letter noted that the charges against Boima had been lodged almost two years earlier and that, at this point, the government's interest in continuing the prosecution was "quite low."[3] App'x 370–71.

The government, however, did not withdraw the complaint, but moved for a *Sell* hearing. The hearing began on June 29, 2022,[4] and continued on September 27, 2022. At the outset, defense counsel asked the court to rule on the "threshold legal question" of whether the government had a sufficiently strong interest in prosecuting Boima. App'x 166. The court declined at that stage, explaining: "I think it's sort of a balance and you might find the Government's interest is

[3] The district court specifically observed that in the event of an application pursuant to *Sell*, "[a] hearing will take time, perhaps many months, and Boima remains detained for an excessive period of time. I suspect that if such an application is made, he will be in custody many months, perhaps years longer than [what] the guideline sentence might be for one who is convicted of spitting at a prison guard." App'x 371.

[4] The hearing transcript records the date as June 29, 2020. *See* App'x 159; *see also* Appellant's Br. at 17. However, the 2020 year appears to be error. *See* Appellee's Br. at 8 (referring to June 29, 2022, as the first date of the *Sell* hearing); Hearing Transcript at App'x 166 (transcribing defense counsel expressing that Boima had already been detained for approximately two years on the instant offense).

relatively low but there are other aspects of the so-called *Sell* factors that indicate maybe what the Government seeks here is not inappropriate." App'x 167.

The government called Dr. Lloyd, who testified regarding the forensic evaluation she had submitted to the court in March. Dr. Lloyd diagnosed Boima with schizophrenia and assessed that he could be restored to competency with psychiatric medication. She calculated that this might take about five and a half months, App'x 209, but that given his refusal to undertake treatment voluntarily, absent *Sell* there is "no other way to restore him to competency," App'x 213. The government also called Dr. Charles Cloutier, a staff psychiatrist at FMC Butner, and introduced his report dated July 19, 2022. Dr. Cloutier testified that he also diagnosed Boima with schizophrenia and that Boima requires medication to be restored to competency. Dr. Cloutier estimated the treatment timeframe as four to eight months.

Near the conclusion of the hearing, in response to a question from the court, the government indicated that in the event it dismisses the charge against Boima in light of his inability to stand trial, "there is a mechanism for civil commitment." App'x 349. The government nonetheless conceded that "I don't know what would

happen with that. I don't know if he would be civilly committed. . . . I don't even know if there would be a proceeding that would [be] undertaken." App'x 349.

D. *Sell* Order

On January 19, 2023, the district court issued a decision and order granting the government's motion to administer antipsychotic medication to Boima to restore him to competency—and to do so forcibly if he refused to take the medication voluntarily. The court noted that based on the medical opinions of Drs. Lloyd and Cloutier, "there is a substantial probability that with appropriate antipsychotic medication, whether voluntarily taken or involuntarily administered, Boima would be restored to competency to face the pending charge, [and] the medication would treat Boima's significant mental illness." App'x 385. The court noted that "[b]oth Dr. Lloyd and Dr. Cloutier testified that there were some side effects connected with such antipsychotic medication, but that those side effects could be monitored and treated." App'x 384–85. And "there is virtually no chance," the court concluded, "that Boima would be restored to competency" without medication. App'x 385. The court did not address the government's interest in prosecuting Boima, other than to note that the court had

"considered the directives and recommendations" of *Sell* and *Washington v. Harper*, 494 U.S. 210 (1990).[5] App'x 384.

On February 2, 2023, the district court denied Boima's motion to stay the court's order. Boima filed a timely notice of appeal. On April 5, 2023, this Court issued a stay of the *Sell* order.

II. DISCUSSION

The Supreme Court in *Sell* "held that the Government may involuntarily medicate a mentally ill defendant to render him competent for trial if: [i] there are important governmental interests in trying the individual; [ii] the treatment will significantly further those interests; [iii] the treatment is necessary to further those interests, considering any less intrusive alternatives; and [iv] the treatment is medically appropriate." *United States v. Gomes*, 387 F.3d 157, 159–60 (2d Cir. 2004) [hereinafter "*Gomes II*"] (discussing *Sell*); *see United States v. Magassouba*, 544 F.3d 387, 396 (2d Cir. 2008) (noting that the Supreme Court held in *Sell* that an

[5] *Harper* addresses the involuntary treatment of inmates with a serious mental illness who are dangerous to themselves or others, where treatment is in the inmate's medical interest. *See* 494 U.S. at 236. The Supreme Court in *Sell* observed that "[a] court need not consider" whether involuntary medication is permissible to render a defendant competent for trial "if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness." 519 U.S. at 181–82 (emphasis in original). Significantly, the government has not argued, nor does the record support, that the *Harper* criteria are satisfied in this case.

incompetent defendant "may be involuntarily medicated for the sole purpose of rendering him competent to stand trial only if [the] four criteria are satisfied"). The first of the four *Sell* factors, "[w]hether the Government's asserted interest is important[,] is a legal question that is subject to *de novo* review."[6] *Gomes II*, 387 F.3d at 160. "The district court's findings with respect to the other *Sell* factors are factual in nature and are therefore subject to review for clear error." *Id.* (citing *Benjamin v. Fraser*, 343 F.3d 35, 43 (2d Cir. 2003)). *Sell* directs that a court "must find" each of the four factors satisfied to order a defendant involuntarily medicated to restore his competency to stand trial. 539 U.S at 180–81. And this Court has held that the government bears the burden of proof to establish each factor by "clear and convincing evidence." *Gomes II*, 387 F.3d at 160.

Here, the district court's order omits any discussion of *Sell*'s first factor, which requires that "a court must find that *important* governmental interests are at stake" before ordering involuntary treatment for the sole purpose of rendering a mentally ill defendant competent for trial. *Sell*, 539 U.S. at 180 (emphasis in original). To be sure, the court's order does provide analysis that would support

[6] We agree with the Fourth Circuit that factual findings relevant to this legal determination are reviewed for clear error. *United States v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005).

affirmative findings as to the latter three *Sell* factors. But it says nothing at all about the governmental interest supporting involuntary medication – an interest that the district court itself had suggested in its May 17, 2022 letter was "quite low." App'x 371. Because we vacate the district court's order for lack of the requisite finding as to *Sell*'s first factor, we need not reach Boima's argument that the government's interest in prosecuting him is insufficient to justify involuntary medication. But because the issue is likely to arise on remand, we offer some guidance to the district court regarding the proper framework that it, in the first instance, is to apply.

* * *

After affirming that a court must find important governmental interests at stake to authorize forced medication for the purpose of restoring a criminal defendant to competency, the *Sell* Court noted that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important," whether the offense "is a serious crime against the person or a serious crime against property." 539 U.S. at 180. It cautioned, however, that "[c]ourts . . . must consider the facts of the individual case in evaluating the Government's interest in

prosecution," noting that "[s]pecial circumstances may lessen the importance of that interest":

> The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill – and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b)).

Id.

As the Tenth Circuit said in *United States v. Valenzuela-Puentes*, "[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." 479 F.3d 1220, 1226 (10th Cir. 2007). Here, Boima faces trial on the charge of assaulting federal officers engaged in the performance of their official duties—a crime for which a defendant may be sentenced to up to eight years in prison. The seriousness of this crime is suggested *both* by the penalty to which Boima would be exposed upon conviction, *see Gomes II*, 387 F.3d at 160 (noting

that "the seriousness of the crime . . . [is] evident from the substantial sentence Gomes faces if convicted" (quoting *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2002) [hereinafter "*Gomes I*"], *cert. granted, judgment vacated on other grounds*, 539 U.S. 939 (2003))); *see also United States v. Palmer*, 507 F.3d 300, 304 (5th Cir. 2007) (noting that "courts [have] held that crimes authorizing punishments of over six months are 'serious'"); *Evans,* 404 F.3d at 237–38 (concluding that the government had an important interest in trying a defendant charged with a felony carrying a maximum term of ten years), *and* by the nature or effect of the allegations leveled against Boima, which surely implicate an important governmental interest in "protect[ing] through application of the criminal law the basic human need for security," *Sell*, 539 U.S. at 180 (citation omitted).

Boima argues that his probable sentencing range under the U.S. Sentencing Guidelines ("Guidelines") is substantially less than eight years—assuming a "worst-case" scenario of perhaps 51 to 63 months' imprisonment. Appellant's Br. at 48. We agree with Boima that district courts should properly consider a potential Guidelines range in assessing the seriousness of an offense for these purposes, provided that such a range can be assessed to some reasonable degree of reliability at the early point at which many *Sell* assessments are likely to occur.

See Gomes I, 289 F.3d at 86 ("It is appropriate for the district court to consider the sentence likely to be imposed in fact rather than the statutory maximum alone.");[7] *see also United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008) ("While the statutory maximum may be more readily ascertainable, any difficulty in estimating the likely [G]uideline[s] range exactly is an insufficient reason to ignore *Sell*'s direction that courts should consider the specific circumstances of individual defendants in determining the seriousness of a crime."). That said, we deem a Guidelines range of 51 to 63 months to itself suggest the seriousness of the offense. *See United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014) (considering a crime to be serious based on a Guidelines range of 33 to 41 months and the underlying conduct of making "lurid and distressing threats" against government employees and officials); *Valenzuela-Puentes*, 479 F.3d at 1226 ("We consider a maximum sentence of twenty years and a likely [G]uideline[s] sentence of six to eight years sufficient to render the underlying crime 'serious.'").

In addition to the statutory maximum, mandatory minimum, and likely Guidelines range faced by the defendant, a judge may also consider, to the extent

[7] Even though *Gomes I* was vacated and remanded for further consideration in light of *Sell*, we held in *Gomes II* that "nothing" in *Sell* undermines the persuasive reasoning of *Gomes I* that courts may consider the "sentence [a defendant] faces if convicted." *Gomes II*, 387 F.3d at 160 (quoting *Gomes I*, 289 F.3d at 86).

reasonably ascertainable, the individual facts of the case as they relate to the factors set forth in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–50 (2007). In particular, the district court should consider "the nature or effect of the underlying conduct," *Valenzuela-Puentes*, 479 F.3d at 1226; *see Gillenwater*, 749 F.3d at 1101, including here the fact that Boima is alleged to have spat "a mixture of saliva and blood" on the uniforms of both officers and on the bare neck of one, App'x 16. Although the district court below observed that "no serious injuries occurred," App'x at 370,[8] it could be argued that Boima's conduct posed not only a risk of disease transmission but also a threat to the authority of corrections officers in the detention facility. To the extent that such facts would be considered by a sentencing judge when weighing the § 3553(a) factors, they should also be considered when assessing whether the alleged crime is serious enough to establish an important government interest in prosecution. *See Gillenwater*, 749 F.3d at 1101.

Of course, the district court on remand must consider not only the seriousness of the crime charged in making a determination on the first *Sell* factor,

[8] Had injuries occurred, Boima would likely be facing a statutory maximum of twenty years instead of eight years. *See* 18 U.S.C. § 111(b) ("Whoever, in the commission of any acts described in [18 U.S.C. § 111(a)], . . . inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.").

but also countervailing considerations that may diminish the governmental interest in moving forward with this prosecution. *See Hernandez-Vasquez*, 513 F.3d at 918 (noting that "common to each of the appellate decisions interpreting *Sell* is a recognition that courts must consider the facts of individual cases in evaluating the government's interest in prosecution"). Even for a serious crime, "[s]pecial circumstances may lessen the importance" of the governmental interest in bringing a defendant to trial. *Sell*, 539 U.S. at 180. *Sell* provides several examples of such circumstances, including the likelihood of civil confinement, which may diminish the risks associated with releasing someone charged with an offense, and a long delay in bringing someone to trial, which creates "the possibility that the defendant has already been confined for a significant amount of time []for which he would receive credit toward any sentence ultimately imposed . . . ." *Id.* (citing 18 U.S.C. § 3585(b)).

In evaluating the governmental interest at stake in Boima's prosecution on remand, the district court should assess the likelihood that Boima may be civilly committed. The likelihood of such commitment may have increased since this matter was first before the district court, as the government has recently filed a certificate of mental disease or defect and dangerousness pursuant to 18 U.S.C. §

4246(a) with the United States District Court for the Eastern District of North Carolina, making possible Boima's commitment if he does not stand trial.[9] To be sure, the prospect of civil commitment is not determinative. *Sell*, 539 U.S. at 180 ("We do not mean to suggest that civil commitment is a substitute for a criminal trial."). But such a prospect may reduce the governmental interest at stake by "diminish[ing] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* Both the government and defense counsel should be prepared to assist the district court in thoroughly assessing this consideration on remand.

The district court should similarly evaluate the likelihood that Boima will remain in custody pending deportation in the event that he is not forcibly medicated and brought to trial. This consideration, too, may affect the

[9] Section 4246(a) provides for the commitment of an individual against whom charges have been dismissed "solely for reasons related to the mental condition of the person" if he or she suffers from a mental disease or defect for which "release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. § 4246(a). Dr. Lloyd noted in her initial report that Boima could be evaluated for commitment under this provision. *See* Report of Dr. Lloyd, SD 24. ("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.").

government's interest in bringing him to trial by diminishing the risks normally attendant on forgoing the prosecution of someone charged with a serious offense.

The district court should also consider the substantial period that has passed since these charges were first brought when evaluating the government's interest in bringing Boima to trial. Four years have elapsed since the filing of the criminal complaint in July 2020, and Boima, who remains in confinement, has not yet been indicted on the charge lodged in that complaint. *Sell* affirms that pretrial confinement may mitigate the government's prosecutorial interest where a "defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b))." *Sell*, 539 U.S. at 180. The parties proffer estimates of Boima's Guidelines range that, assuming a criminal history category of VI, are as low as 27 to 33 months or as high as 51 to 63 months, depending on factors such as acceptance of responsibility following a plea agreement and whether Boima qualifies as a career offender. Appellant's Br. at 47–48; *see* Appellee's Br. at 19 (citing Appellant's Br. at 47–48); U.S.S.G. § 5A (Sentencing Table). Were Boima's case to result in a conviction and reach the sentencing stage, the district court presumably would credit the four years of pretrial detention Boima has already served—plus

additional time accrued by that date—toward the sentence. *See Sell*, 539 U.S. at 180 (citing 18 U.S.C. § 3585(b)). This period would also potentially include the time needed to restore Boima to competency, which the experts estimate could take between four and eight months, as well as the time required for plea or trial proceedings and sentencing.

On remand, the district court should consider these special circumstances in evaluating the first *Sell* factor. Open questions remain regarding whether Boima will face civil commitment, release, or immigration custody pending deportation if not brought to trial in this case. The district court must consider the likelihood of these events occurring, as a low or moderate probability may limit or defeat their potential mitigating effects on the strength of the governmental interest in prosecution. *Cf. Gomes II*, 387 F.3d at 161 (assessing that "we need not consider how the potential for civil commitment impacts this case" because "[t]here is little, if any, evidence on the record to suggest that Gomes would qualify for civil commitment"). The court must also consider how time served and the additional time necessary for treatment and future proceedings relate to the potential sentence Boima faces, if convicted. These considerations are not exhaustive; the district court may ascertain that changes with the passage of time raise additional

considerations. This Court takes no position on the resolution of these questions at the present stage.

III. CONCLUSION

For the foregoing reasons, we VACATE the order permitting Boima's involuntary medication and REMAND for further proceedings consistent with this opinion.