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## I.

## STATEMENT OF FACTS

On ____, this court signed an order pursuant to 18 U.S.C. _ 4241, ordering a qualified and impartial psychologist to examine Mr. * to determine his competency to stand trial.

On _____, Dr. ** sent a letter to the court indicating that, in his opinion, Mr. * was not competent to stand trial. Furthermore, Mr. * was unable to assist counsel in the preparation of a defense.

On _____, at _____., this court received in evidence the Mental Competency Evaluation of **, Ph.D. After considering the evidence, and the comments of counsel, this court found by a preponderance of evidence that Mr. * was presently suffering from a mental disease or defect rendering him mentally incompetent. This court ordered that Mr. * be committed to the custody of the Attorney General . Mr. * was transferred to ****, for further evaluation.

On _____, a status conference was held concerning Mr. *'s treatment. It was shown that on _____, Mr. * was delivered to **** for evaluation. On _____, defense counsel received a copy of the report Dr. **, M.D., staff psychiatrist at **** Federal Medical Center (FMC). The accompanying letter from****, Warden of the Federal Medical Center states that in their opinion they believe that Mr. * is suffering from a mental disease or defect rendering him mentally incompetent. In addition, the report states that with an additional period of hospitalization, Mr. *'s competency "may be restored." Mr. **** requests that Mr. * remain at **** to undergo further treatment. This letter, from the Warden at FMC, asks for judicial oversight as required by Sell v. United States, 539 U.S. 166 (2003) to determine whether FMC should be allowed to forcibly medicate Mr. * to restore his competency to proceed to trial. If Mr. * is ordered medicated, they

requested a full four-month period for restoration under 18 U.S.C. §4241(d).

On _____, the Court held a video conference evidentiary hearing regarding FMC's request to involuntarily medicate Mr. *. Mr. * was present (through video conference) at the hearing. Dr. *, Staff Psychiatrist at FMC, testified regarding FMC's request to forcibly medicate Mr. *. This briefing follows pursuant to the Court's request.

## II.

## DEFENDANT MUST BE RELEASED WHEN THERE IS NOT A SUBSTANTIAL PROBABILITY THAT HE WILL ATTAIN THE CAPACITY TO PERMIT TRIAL TO PROCEED AFTER THE FOUR MONTHS HAVE EXPIRED. 18 U.S.C. § 4241(d)(2).

### A. An Extension Is Not Reasonable in This Case When the Required Burden Has Not Been Shown.

Section § 4241(a) provides that whenever a court has reasonable cause to believe a defendant is suffering from mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court may conduct a hearing to determine the defendant's competency. Pursuant to 18 U.S.C. § 4241(d), if, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect, the court shall commit the defendant to the custody of the Attorney General.

Being committed to the custody of the Attorney General, a defendant can be hospitalized for treatment in a suitable facility for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed. 18 U.S.C.§ 4241(d)(1).

Further, a defendant may be hospitalized for an additional "reasonable" period of time to determine "whether there is a substantial probability that within that time he will attain the capacity

to permit the trial to proceed" or "until the pending charges against him are disposed of according to law; whichever is earlier." *Id.* § 4241(d)(2).

On _____, this court found * incompetent and committed him to the custody of the Attorney General for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed pursuant to 18 U.S.C. § 4241(d)(1). Said period of time therefore expired on _____.

According to section 4241(d)(2)(A), an "additional reasonable period of time" cannot be granted unless the court finds that "there is a **substantial probability** that within such additional period of time he will attain the capacity to permit the trial to proceed." 18 U.S.C. § 4241(d)(2)(A). This burden has not been met. Nowhere in either Dr. **'s report, nor in the letter from Mr. ****, Warden of ****, does it state that there is a "substantial probability" that Mr. * will regain competency during this extension. This court cannot state that there is a **substantial probability** that Mr. * will attain capacity within this four month period. This by no means meets the standard of "substantial probability" the statute sets forth. Accordingly, an extension should not be granted.

**B. The Court's Remedy for Mr. * Is an Order Releasing Him from ****.**

Title 18, United Stated Code, section 4246(a), states if:

> the director of the facility in which a person is hospitalized certifies that a person in custody ... who has been committed ... pursuant to section 4142(d), ... is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, ... he shall transmit the certificate to the clerk of the court for the district in which the person is confined.
>
> In the event that such a certificate is filed, the court shall conduct a hearing. A certificate

filed under this subsection shall stay the release of the person pending completion of procedures contained in section 4246.

As Dr. *** did not conclude that there is a substantial probability that Mr. * would regain competency by the end of another four months (or the time extended), then it is apparent that Mr. * cannot remain at ****. It is also clear from the report submitted by Mr. ***, that Dr. *** does not believe that Mr. * can proceed to trial now. Furthermore, there is no indication from Dr. *** nor from court records, that **** has filed a certificate under section 4246, although this has been indicated to defense counsel in telephone conversations.

Since Mr. * has not been certified as a danger to the community under section 4246 and since it has not been determined that there is a "substantial probability" that he will regain competency with further treatment, Mr. *'s release from custody is the appropriate remedy under law. The limitation on the detention of incompetent defendants was dictated by Jackson v. Indiana, 406 U.S. 715, 738 (1972), which struck down Indiana's statute authorizing indefinite commitment of incompetent defendants who were not dangerous as violative of Due Process. "Thus, under this scheme, an incompetent defendant must be released after four months if recovery is unlikely, 18 U.S.C. § 4241(d), or else committed indefinitely if found dangerous, 18 U.S.C. § 4246." United States v. Ecker, 78 F.3d 726, 731 (1st Cir. 1996).

In Weber v. United States District Court, the Ninth Circuit found that the district court lacked the authority to initiate a hearing to determine whether the defendant should continue treatment in a psychiatric facility. 9 F.3d 76, 79 (9th Cir. 1993). This case is akin to Weber for one reason: this court does not have statutory authority to order Mr. * to remain or return to **** for further treatment. The only authority for this transfer is provided in section 4241. Either the court finds that there is a substantial probability that Mr. * will regain competence and then further

treatment can be ordered or a 4246 determination must be filed by the end of the four month period. Since neither or these conditions have been met, the Court does not have statutory authority to order further treatment.

## III.

## DEFENDANT HAS A CONSTITUTIONAL RIGHT TO BE PRESENT FOR A COMPETENCY HEARING

A defendant has a constitutional right to be present at every stage of the trial where his absence might frustrate the fairness of the proceedings. Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986); Bustamante v. Eyman, 456 F.2d 269, 271-74 (9th Cir. 1972). This right is grounded in both the Confrontation Clause of the Sixth Amendment, and the Due Process Clause of the Fifth Amendment. United States v. Rewald, 889 F.2d 836, 854 (9th Cir. 1989). This right is called into question whenever the defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-7 (1934). The main question at issue in a competency hearing is the defendants ability to defend against the charge. Exploring this right further, the district court noted that "the courts have long recognized that the constitutional right of a defendant to a fair trial includes not only his right to be physically present and to assist in his own defense, but also embraces his right to be present mentally as well." United States v. Gundelfinger, 98 F.Supp. 630, 631 (W.D. Pa. 1951). The Ninth Circuit has opined that the right to be present at a pre-trial hearing concerning competency, or the defendants right to assist in his own defense, has the same importance as the right to be present at trial itself. Sturgis, 796 F.2d at 1109 (citing Bustamante, 456 F.2d at 274-

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75).

Beyond the issue of fundamental fairness to the defendant lies the issue of the public interest. Both the Ninth Circuit and the Supreme Court have found the defendant's presence beneficial to the court in determining a defendant's competence. In Estelle v. Smith, the Court found that a pretrial competency examination (referring to the examination prior to the in-court competency hearing) is an adversarial stage. 451 U.S. 454, 457 (1981). The Ninth Circuit in Sturgis stated that "the defendant's demeanor and behavior in the courtroom can often be as probative on the issue of competency as the testimony of expert witnesses." 796 F.2d at 1109. In its analysis the Ninth Circuit further noted that on both occasions when Sturgis, the defendant, was present at hearings to determine his competency, he was found incompetent; and on both occasions when he was not, he was determined to be competent. Id. The Court concluded that Sturgis had a constitutional right to be present at the competency hearing. Id.

**IV.**

**INVOLUNTARY MEDICATION IS NOT WARRANTED IN MR. *'S CASE**

Under the Due Process Clause, "an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs." Sell v. United States, 539 U.S. 166, 178 (2003) (internal citation and quotation marks omitted). The Supreme Court has recognized that the forced administration of unwanted antipsychotic medication is a "particularly severe" invasion of liberty. Riggins, v. Nevada, 504 U.S. 127, 134 (1992). This constitutional right—indeed, this fundamental human right to bodily integrity—does not evaporate even if a person is in custody having been accused of a crime. Thus, although Mr. * has been declared incompetent to stand trial, he has a significant liberty interest in avoiding the unwanted administration of mind-altering drugs. In order for this court to find that involuntary medication

is warranted under Sell, the government must meet its burden by clear and convincing evidence.

**A. The Only Evidence Presented to This Court Is the Testimony of Dr. ***

On ____, Dr. * was sworn to testify before this Court regarding FMC's request to forcibly medicate Mr. *. As noted in previous filings, the information and reports submitted by the FMC staff are not admissible "evidence" for the simple reason that the attestants are not sworn under oath. To rely solely on this report is a violation of Federal Rule of Evidence 603.

> Before testifying, every witness ***shall*** be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Fed. R. Evid. 603 (emphasis added); see also United States v. Hawkins, 76 F.3d 545, 551 (4th Cir. 1996) ("[T]estimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible."). This rule is mandatory: every witness must swear to tell the truth before he testifies. If the witness does not swear an oath to tell the truth, his statements are not competent evidence that can be considered by any court.

The reason for this rule is simple and derives from long-standing common law principles: "An 'Oath or affirmation' is a formal assertion of, or attestation to, the truth of what has been, or is to be, said. It is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words." United States v. Turner, 558 F.2d 46, 50 (2d. Cir. 1977). "The theory is that those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or been so impressed." Id.

Thus, the only evidence for this Court to consider is the testimony of Dr. *, who was sworn under oath on _____before this Court.

**B. Mr. * Agrees with the Government That Involuntary Medication Is Not Appropriate**

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In Sell v. United States,539 U.S. 166, 179 (2003), the Supreme Court found that a mentally ill defendant "facing serious criminal charges" may be forcibly given antipsychotic drugs to render him competent to stand trial "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." The Court noted, "this standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances, but those instances are rare." Id.

**1. Serious Governmental Interests Are Not at Stake**

Mr. * disagrees with the government that a serious governmental interest is at stake. The Supreme Court emphasized that the Government has an "important" interest in bringing to trial people accused of either serious crimes against the person or property. Sell, 539 U.S. at 180. While the Supreme Court did not offer much guidance as to what constitutes a serious crime, the Ninth Circuit has stated that the "likely guideline range" for the charged crime "is the appropriate starting point for the analysis of a crime's seriousness." United States v. Hernandez-Vasquez, 513 F.3d 908, 919 (9th Cir. 2008). The court continued: "It is not, however, the only factor that should be considered." Id. General dangerousness concerns, however, are not relevant to this determinations. Id. Moreover, in some particularly aggravated circumstances, an alleged violation of 18 U.S.C. _ 1326 could constitute a serious crime. Id.

In United States v. Dumeny, 295 F.Supp.2d 131, 132-33 (D. Me. 2004), possession of a firearm by a person previously committed to a mental health institute did not qualify as a "serious offense." In United States v. Miller, 292 F. Supp.2d 163, 164-165 (D. Me. 2003), the district court determined that Miller's pending charges of unlawful transport and possession of firearms by a person committed to a mental institution did not rise to a serious offense warranting forcible

medication. As Mr. * is not charged with a "serious offense," this prong fails.

**2. Involuntary Medication Will Not Further Significant Government Interests**

The government must also prove that involuntary medication will significantly further government interests. Sell, 539 U.S. at 179-80. The court must find that the administration of drugs is substantially likely to render the defendant competent to stand trial. At the same time, there must be a finding that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.

At the hearing on _____, Dr. * stated the intended course of treatment would be Risperdal [RT 10]. Risperdal would be given orally (if Mr. * agreed to take medication) or by intramuscular injection (as would be needed for "involuntary medication"). [RT 10]. Mr. * had previously taken one dose, after encouragement from the staff at FMC, which led to side effects. The side effects caused Mr. * to discontinue the dosage of Risperdal. [See report from FMC, pg. 4, RT 10]. Dr * stated that Risperdal has been used for at least ten years, the side effects are well known, and it has been approved by the FDA. [RT 15]. Dr. * noted though that the FDA just approved Risperdal in 2002. [RT 28]. No long term studies have been performed based on Risperdal as the medication did recently gain FDA approval. [RT 28]. Dr. * noted the following side effects of Risperdal: sedation, dizziness, stomach upset, nausea, weight gain, restlessness, and possibly increase of energy. [RT 12]. Other possible sides effects are elevated glucose or diabetes. [RT 12-13]. Dr. * further noted a risk of tardive dyskinesia which is involuntary movements of the mouth and tongue with a possibility of difficult controlling other extremities. [RT 14]. In addition, Doctor * stated if Risperdal does not help Mr. *, Haldol, would be a second option. [RT 27-28]. This could happen if for example, Mr. * developed diabetes from Risperdal. [RT 44-45]. Haldol has some

of the same side effects but also lists more detrimental side effects such as tardive dyskinesia [RT 13] and muscle stiffness. [RT 13].

Even if Mr. * is medicated, over time, he will "lose competency." [RT 32]. With Risperdal, the proposed treatment, in approximately two weeks the medication would begin to leave Mr. *' system. [RT 32]. Typically, Mr. * after this amount of time, would lose his ability to be competent. [RT 32].

**3. Involuntary Medication Is Not Necessary to Further Governmental Interests**

To involuntarily medicate Mr. *, this court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatment is unlikely to achieve substantially the same results. A court must also consider less intrusive means for administering the drugs. First, Mr. * has agreed to receive medication on one occasion while at FMC. (Medical center report, page 4). With only "encouragement," Mr. * agreed to take medication because he "didn't want to think this way." (Medical Center Report, page 4). Less intrusive means are appropriate if with "encouragement" Mr. * will agree to take medication. Dr. * stated that there is no other treatment for course other than antipsychotic medication for treating the psychotic symptoms of schizophrenia. [RT 21]. Notably, at FMC, there are administrative hearings where a staff member is appointed to research less intrusive alternatives to involuntary medication. [RT 22]. The doctor then noted that in addition to involuntary medication, there are other treatments such as competency restoration group individualization and vocational rehabilitation. [RT 22-23]. Lastly, the doctor noted art therapy and various adjunctive treatments. [RT 23]. As Mr. * has previously agreed to take an oral medication, involuntary medication is not the least intrusive treatment. In addition, it appears that FMC has not explored other alternative treatments which are routinely evaluated in their own administrative hearings, with an appointed

staff representative. Alternatives to involuntary medication exist, but they have not been explored in Mr. *'s case.

**4. Administration of Drugs Is Not Medically Appropriate Nor Is Forcible Medication in Mr. *'s Best Interest**

The government lastly must prove, and this Court must conclude, that the administration of drugs is medically appropriate or in the patient's best medical interest in light of his medical condition. In evaluating whether or not forcible medication is "medically appropriate" in Mr. *'s case, the staff at FMC write that Mr. * has refused psychiatric medication and appears unable to make treatment decisions. (Medical Center report, page 7). Further they note, "he has no insight into his mental illness." (Medical Center report, page 7). Mr. * agreed to take medication on at least one occasion while at FMC because he believed it would aid in his treatment. He stopped taking the medication, according to the report, due to a side effects. Mr. *'s choice to take medication to help his "thinking" then to stop when a side effect resulted, illustrates that Mr. * may indeed have the ability to make decisions regarding his treatment.

Dr. * also discussed how a person who has suffered from mental disease for quite some time without treatment could have more neurological or neuro-damage due to the treatment. [RT 29]. The doctor noted the length of time without medication is a poor prognostic factor. [RT 30]. Dr. * had met with Mr. * upon his initial entry into FMC on _____[RT 31] and _____[RT 31]. These two interactions form the basis for the doctor's conclusions regarding Mr. *' care. Dr. * had previously practiced in private practice. [RT 48]. During this time, Dr. * did not recommend involuntary medication for <u>any</u> patients that suffered from schizophrenia. [RT 48].

In Dr. *'s opinion, Mr. * would need to be medicated for anywhere from 4-6 months, up to 8 months, in order to be restored to competency. [RT 33]. Without medication, the prognosis of

regaining competency is approximately 10-20 percent. [RT 21, 32]. With medication, the prognosis of regaining competency ranges from 30-50 percent. [RT 16, 21, 32, 49-50]

**5. The Government Has Not Met Their Burden Under Sell and the Government Is Further Not Advocating Involuntary Medication**

As the government argued in their responsive pleadings, there is no post-Sell authority where a Court ordered involuntary medication based upon a 50 percent probability of restoring competency.[Government's Response at 2]. Mr. * agrees that a 50 percent (as a high estimate compared to the earlier noted 30 percent) probability of restoring competency does not rise to a substantial level. As the government is not advocating involuntary medication, this Court should not order Mr. * to be involuntarily medicated. Further, as addressed above, not a single Sell factor is met in Mr. *'s case. For these reasons, this Court must not order involuntary medication of Mr. *.

**V.**

**IF THIS COURT CHOOSES TO ODER THE FORCIBLE MEDICATION OF MR. *, MR. * REQUESTS THAT THE ORDER BE LIMITED**

If this Court determines that forcible medication is appropriate, Mr. * asks that this Court follow the Ninth Circuit's instructions on the scope of such an order:

> [A] *Sell* order must provide at least some limitations on the medications that may be administered and the maximum dosages and duration of treatment. At a minimum, to pass muster under *Sell*, the district court's order must identify: (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court on the defendant's mental condition and progress.

United States v. Hernandez-Vasquez, 513 F.3d 908, 916-17 (9th Cir. 2008).

**VI.**

**IF THIS COURT CHOOSES TO ODER THE FORCIBLE MEDICATION OF MR. *, MR. * REQUESTS THAT THE ORDER IS STAYED PENDING APPEAL**

Mr. * requests that if this Court finds the requirements of Sell are met and orders forcible medication, that this Court stay the order pending appeal. As stated above, Mr. * does not believe that the Sell factors have been met. The government also disagrees with the forcible medication of Mr. *. As the burden is on the government to prove by clear and convincing evidence that involuntary medication is warranted under Sell, Mr. * should not be forcibly medicated. Mr. * also challenges continued commitment at Medical Center under Title 18, U.S.C. § 4241(d)(2) because there is no "substantial probability" that he will regain competency in the "foreseeable future." If Mr. * was to prevail on all his claims, the doctors at FMC would be precluded from involuntarily medicating him, and he would have to be released from custody.

If this Court were to order the forcible medication of Mr. * and then deny the request for a stay, irreparable harm would result. No one can undo the intrusive effect of forced medication, particularly if it was ordered in violation of the Constitution. Thus, if this Court orders the involuntary medication of Mr. * this Court should stay the order pending appeal.

## VII.

## CONCLUSION

Based upon the foregoing arguments, * that this Court grant his motion and order his immediate release.