

The Ninth Circuit dismissed the State's claim that the application of the *Krain* ruling would create a blanket rule for the appointment of counsel for mentally incompetent *habeas* petitioners. The Ninth Circuit limited its holding to the appointment of counsel for the purpose of representing the petitioner at the competency hearing.

*Discussion*

In *Pate v. Robinson* 383 U.S. 375 (1966) and *Drope v. Missouri* 420 U.S. 162 (1975), the United States Supreme Court established the principle that the courts and prosecution must raise the issue of incompetence in a criminal defendant when there is sufficient evidence, even if the defense does not. In this case, an unrepresented petitioner in a *habeas* hearing was unable to follow the orders of the district court, and the evidence he provided regarding the presence of mental illness consisted of a sworn declaration from himself and a fellow prisoner as well as a letter from a prison psychiatrist. Although the petitioner did not directly request a competency hearing, the Ninth Circuit holds the district court accountable for raising the issue of incompetence.

The Ninth Circuit leaves open the criteria to be used in determining competence in pursuing a *habeas* petition. The language in the holding stated "an appropriate standard for habeas petitioners" should be applied. Further clarifications in this standard may develop with subsequent case law.

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## Application of *Sell v. United States*

### **A Harper Inquiry Should Precede a Sell Inquiry in Determining the Involuntary Administration of Psychiatric Medications**

In *United States v. Morrison*, 415 F.3d 1180 (10th Cir. 2005), the Tenth Circuit Court of Appeals considered whether the district court erred in ordering

involuntary medication based on application of the test described in *Sell v. United States*, 539 U.S. 166 (2003), without first considering administration of involuntary medication under the criteria set forth in *Harper v. Washington*, 494 U.S. 210 (1990), in a defendant found incompetent to stand trial.

The *Sell* test for the involuntary administration of psychiatric medications to restore competency to stand trial consists of four prongs:

1. A court must find that important government interests are at stake—that is, bringing a serious crime to trial.

2. A court must find that the medication is both substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.

3. A court must find that any alternative, less-intrusive treatments are unlikely to achieve substantially the same results.

4. A court must conclude that administration of the drugs is medically appropriate—that is, in the patient's best medical interest in light of his medical condition.

*Facts of the Case*

In February 2003, Jay Richard Morrison was charged with two federal counts of transmitting Internet communications that threatened the lives of the First President of the Church of Jesus Christ of Latter Day Saints and the members of the church's Quorum of the Twelve Apostles. At the Government's request, the magistrate judge ordered an examination of Mr. Morrison's competency to stand trial. The psychiatric evaluation found Mr. Morrison incompetent to stand trial and most likely insane at the time of the offense. The magistrate judge determined that Mr. Morrison was incompetent to stand trial and committed the defendant for treatment.

Initially, Mr. Morrison refused to take any medications but later consented to take quetiapine and continued to take the medication for four weeks. Subsequently, Mr. Morrison refused the medication, stating that it caused him to have "heart attacks."

The clinical psychologist treating Mr. Morrison stated that antipsychotic medication was necessary to restore competency. The psychologist addressed the last three prongs of the *Sell* test, stating that there was a substantial probability that the medication would

render the defendant competent to stand trial without producing side effects that would affect his ability to assist counsel, that his symptoms were unlikely to improve without medication, and that medication was medically appropriate for his condition, schizophrenia.

In January 2004, the government moved for an order to administer the medication involuntarily. One month later, the magistrate judge authorized the use of involuntary medication, but Mr. Morrison continued to refuse to take the medication. In April 2004, the magistrate judge held a hearing regarding the motion to compel medication. The Government relied on the testimony of the treating psychologist to address the last three prongs of the *Sell* test and contended that the first prong of *Sell* was satisfied by “the defendant’s [being] accused of a serious crime” and “facts [showing] that the [defendant] is a danger to the community. . . that there’s a serious governmental interest in bringing the defendant to trial because of the victims that have been involved, good members of society.”

In response, defense counsel agreed that medication was likely to restore competency but argued that side effects (“kidney pain, heart palpitations, and frequent sweating”) would interfere with Mr. Morrison’s ability to assist counsel and could affect his appearance in front of a jury. In addition, defense counsel argued that the medication was medically inappropriate because of the side effects experienced by Mr. Morrison. However, the main contention of the defense was that the first prong of *Sell* was not satisfied. The government’s interest was diminished because Mr. Morrison had a likely insanity defense and had been confined for almost the entire term to which he would be sentenced if found guilty. If Mr. Morrison were to be found not guilty by reason of insanity, he would undergo a hearing for civil commitment based on dangerousness. Thus, the defense argued that a hearing to determine civil commitment based on dangerousness should be held instead of ordering involuntary medication.

The magistrate judge ruled in favor of the government and concluded that all four prongs of the *Sell* test were satisfied by a preponderance of the evidence. The magistrate judge also noted that, since the outcome of a civil commitment hearing could not be predicted, he could not appropriately balance the government’s interest in prosecution against the possibility of a lengthy civil commitment. Mr. Morrison appealed to the district court, which ruled that

the magistrate judge had not erred in ordering the involuntary administration of medication. Mr. Morrison then appealed to the Tenth Circuit.

#### Ruling

The Tenth Circuit vacated the order to force medication and remanded the case for further proceedings. The Tenth Circuit directed the district court to require the government to proceed under a *Harper* inquiry or explain why it chooses not to.

#### Reasoning

In *Sell*, the United States Supreme Court reasoned that the forcible administration of medications can be achieved by means other than using the *Sell* criteria:

A court need not consider whether to allow forced medication for [the purpose of rendering the defendant competent to stand trial], if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual’s dangerousness or purposes related to the individual’s own interests where refusal to take drugs puts his health gravely at risk. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question (emphasis in original) [*Sell*, 539 U.S. 166, pp 181–2].

The Court added that courts “should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on. . . *Harper*-type grounds; and if not, why not.”

In *Harper*, the Court held that a prisoner’s right to refuse medications could be overcome if the prisoner had a mental illness and posed a risk of danger to himself or others. In the current case, the Tenth Circuit concluded that a *Harper* inquiry should have preceded a *Sell* inquiry because it is more “objective and manageable” for psychiatric evaluators to determine the involuntary administration of medications based on dangerousness rather than on *Sell* criteria. The Tenth Circuit reasoned that conducting a *Harper* inquiry and assessing the level of dangerousness posed by Mr. Morrison would have informed the court whether he could be civilly committed, thereby diminishing the government’s interest in pursuing a criminal trial. In addition, the Tenth Circuit noted that a *Harper* inquiry would have provided information to the magistrate judge on the possible outcome of a civil commitment hearing, since the issue of dangerousness would have been addressed.

The Tenth Circuit concluded:

There may be occasions when it is appropriate to resolve whether the four-part *Sell* test justifies an order for involuntary administration of psychotropic drugs without first determining

whether there is an alternative ground for such an order. But it would be good practice to assume otherwise [415 F.3d at 1186].

*Discussion*

The *Sell* decision has had a large impact on the adjudication of defendants found incompetent to stand trial. The ruling has generated appellate level reviews in the Federal and State systems. In California, statutory changes involving incompetent defendants reflect the impact of the *Sell* decision. In the California Penal Code, if a person is found incompetent to stand trial, the evaluator must consider whether the person lacks capacity to make decisions about taking medications and assess the person's level of dangerousness to self and others. The current case reinforces, through the judiciary, the hierarchy of considerations that should be examined when the issue of forcible medication arises. As set out in *Harper*, the involuntary administration of psychiatric medications can be justified on the grounds of decreasing the risk of danger to self or others in an incarcerated population. In its decision, the Tenth Circuit reiterates the Court's qualification in *Sell* that the new criteria should be applied only after more easily answered grounds for forcing medication are exhausted.

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## Competence to Stand Trial and Application of *Sell* Standards

### *Involuntary Medication Allowed in a Nondangerous Defendant, to Restore Competence to Stand Trial*

In *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005), the United States Court of Appeals for the Tenth Circuit considered whether the court for the District of Wyoming had correctly applied the standards set forth in *Sell v. United States*, 539 U.S. 166 (2003). The district court ordered the involuntary administration of antipsychotic medications to render the defendant competent to stand trial.

### *Facts of the Case*

In January 2003, Steven Paul Bradley was charged with extortion and use of an explosive device. He had thrown a hand grenade at a group of salesman at a car dealership as he rode by on his motorcycle. Attached to the grenade was a note asking for money, because he was dissatisfied with a purchase of a vehicle from the dealership. When interviewed by law enforcement, Mr. Bradley admitted to this incident. Mr. Bradley also indicated that he possessed explosives because he believed someone was trying to kill him.

In February 2003, the court ordered that Mr. Bradley be committed to a hospital for a psychiatric examination to determine his competency to stand trial. Richard DeMier, PhD, diagnosed Mr. Bradley with a psychotic illness. He further opined that Mr. Bradley was a not a danger to himself or others while in the institution and that he was not competent to stand trial. At a competency hearing in June 2003, the court ordered Mr. Bradley recommitted to the hospital for treatment and further evaluation.

Three days before Mr. Bradley's competency hearing, the Supreme Court decided *Sell*, in which the Court held that if a defendant is not dangerous and is competent to refuse medications, then the involuntary administration of medications to restore competence is permissible if three factual (clinical) conditions are met: (1) the treatment is medically appropriate, (2) the treatment is substantially unlikely to have side effects that may undermine the trial's fairness, and, (3) taking into account less-intrusive alternatives, the treatment is necessary to further important governmental trial-related interests.

Dr. DeMier conducted a follow-up assessment of Mr. Bradley with the *Sell* factors in mind. He opined that Mr. Bradley was incompetent to stand trial because of his mental illness. Mr. Bradley has a psychotic disorder, and the treatment of choice was antipsychotic medication. The facility's psychiatrist agreed that antipsychotic medications were medically appropriate. Dr. DeMier concluded that side effects of antipsychotic medications would not undermine the trial's fairness. He opined that treating the psychotic illness would "likely enhance, rather than undermine, the fairness of any legal proceeding in which the patient is a participant." Mr. Bradley was unwilling to take antipsychotic medications voluntarily.