The court also rejected the claim that the failure to obtain a pretrial PET scan denied him the opportunity to challenge his *Miranda* waiver. The court found the *Miranda* claim to be procedurally barred, having been litigated on direct appeal.

Next the court proceeded to the question of Mr. Miller's competence based on the congruent assessments of multiple experts "none of whom concluded that the results of the MRI or their neurological evaluations indicated that his neurological impairments prohibited him from making a knowing, voluntary, and intelligent waiver of his *Miranda* rights" (*Miller*, p 373). The court held that trial counsel had reasonably relied on the expert opinions of Drs. Mings and Danziger regarding neuroimaging. In addition, the court held that Mr. Miller failed to establish prejudice on the question of statutory mitigation for extreme mental or emotional disturbance and inability to conform his conduct to the law, noting the conflicting expert opinions regarding the level of Mr. Miller's cognitive impairment at the time of the offense.

A novel appeal claim was that the clinical condition of BVFD warranted setting aside the death penalty because of Mr. Miller's predicted incompetency. The court deflected this assertion, stating, "This claim is not ripe for review because Miller is currently competent and a death warrant has not been issued for his execution" (*Miller*, p 384).

The supreme court then affirmed the postconviction court and rejected his petition for a writ of *habeas corpus*.

Discussion

An unusual aspect of this case is the instruction given by Mr. Miller to his trial attorney to conduct the sentencing phase so that he would be given the death penalty, but by nonunanimous recommendation of the jury, thus preserving as many claims as possible to prolong the appeal process. In postconviction proceedings, the defense attorney testified that he agreed to pursue Mr. Miller's instruction. Although an attorney may accommodate the competent desires of the defendant, in this case, the defendant's wishes were likely based on the diagnosis of BVFD that was proffered by a defense expert, Dr. Wood. Mr. Miller took a risk, opting to have the better living conditions afforded on death row, and his gamble anticipated that his mental condition would decline so rapidly as to preclude execution. Given that circumstance, it is difficult to conclude that his attorney fell short of the *Strickland* test in his defense of his client. However, Mr. Miller's decision-making capacity might have been questioned given that there appears to have been agreement among the clinical experts that Mr. Miller had some degree of cognitive impairment at the time he dictated his trial and sentencing strategies. Given the ultimate stakes involved, it would have been reasonable to have an evaluation of his competency, not merely to stand trial, but also to dictate trial and sentencing strategy.

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Involuntary Treatment for Restoration of Trial Capacity and the Role of Trial Courts

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Trial Courts Possess the Power to Order Involuntary Treatment of the Defendant When Deemed Necessary to Restore Trial Capacity, if the Due Process Requirements Set Out in *Sell v. United States* Are Met

In *State v. Lopes*, 322 P.3d 512 (Or. 2014) the Supreme Court of Oregon issued a peremptory writ of *mandamus* to James Lopes, holding that although the trial court had the power to order the involuntary treatment that was deemed necessary for the restoration of Mr. Lopes' trial capacity, the due process requirements of the U.S. Constitution, as articulated in *Sell v. United States,* 539 U.S. 166 (2003), were not satisfied by the trial court's order for forced medication.

Facts of the Case

Mr. Lopes was arrested in August 2012 and charged with attempted sex abuse in the first-degree after sexually assaulting an 8-year-old girl. He was found unfit to stand trial due to his inability to assist counsel. In October 2012, Mr. Lopes was committed to the Oregon State Hospital to be treated for restoration of fitness.

Subsequently, the hospital informed the trial court that it was unlikely that Mr. Lopes could be

restored in the near future unless treated with psychiatric medications and that Mr. Lopes could not be involuntarily medicated because he did not meet the state standards for civil commitment.

In February 2013, Mr. Lopes filed a motion to dismiss the charges against him. During the hearing to address the motion, the court examined whether it possessed the power to order Mr. Lopes to be involuntarily medicated, and if so, whether the state had provided the necessary evidence to support an order for involuntary treatment that satisfied the due process requirements articulated in *Sell v. United States*, 539 U.S. 166 (2003). In *Sell*, the United States Supreme Court held that to enter an order for involuntary medication:

> . . . first, a court must find that *important* interests are at stake. . . . Second, the court must conclude that forced medication will *significantly further* those concomitant interests. It must find that medication is 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 defense. Third, the court must conclude that involuntary medication is *necessary* to further those interests and find that alternative, less intrusive treatments are unlikely to achieve substantially the same results. Fourth, the court must conclude that administering the drugs is *medically appropriate* (*Sell*, pp 180–1; emphasis in original).

In June 2013, the trial court held a hearing and entered an order for the administration of involuntary medications to Mr. Lopes, after concluding that the court had the authority to order him to be involuntarily medicated and that the due process requirements outlined in *Sell* had been fulfilled.

The trial court issued a stay of the order for involuntary medication at Mr. Lopes' request to allow him to challenge the order in court. Mr. Lopes then petitioned the Supreme Court of Oregon for a writ of *mandamus* ordering the trial court to vacate the forced-medication order. He argued that Oregon trial courts do not have the authority to enter *Sell* orders, as *Sell* assumes but does not grant trial courts that authority, and that Oregon law does not explicitly state that they have that authority. He also argued that the trial court's order did not comport with the due process requirements outlined in *Sell*. The Supreme Court of Oregon "stayed the trial court's order and issued an alternative writ of mandamus instructing the trial court either to vacate the order or to show cause for doing so" (*Lopes*, p 515).

Ruling and Reasoning

With respect to Mr. Lopes' argument that Oregon courts do not have the authority to enter *Sell* orders, the Supreme Court of Oregon held that, even though Oregon does not have statutes that explicitly grant trial courts the authority to enter *Sell* orders, the state's statute related to involuntary commitment for treatment also allows the court to hospitalize the defendant for treatment designed for the purpose of enabling the defendant to gain or regain trial capacity. It therefore concluded that the trial court had the authority to enter a *Sell* order. The ruling is primarily relevant to Oregon and its specific statute (Or. Rev. Stat. § 161.370 (2011)).

In addressing Mr. Lopes' due process claim, the Supreme Court of Oregon concluded that the trial court's order did not follow the due process requirements set out in *Sell*. Particularly, the Oregon Supreme Court opined that the trial court records did not include the necessary details to demonstrate that Mr. Lopes' prosecution and conviction would sufficiently advance governmental interests. "In most of the cases in which federal courts have considered the constitutionality of *Sell* orders, the crimes charged have been punishable by five or more years in prison, and courts generally have concluded that such crimes are 'serious' under *Sell*" (*Lopes*, p 525). However, some courts have concluded that crimes with sentences of greater than six months in prison are serious. Courts consider not only the length of sentence a crime carries but also the nature of the crime in weighing whether it is serious. In this case, the trial court found that Mr. Lopes had been charged with a Class C felony but it did not make a finding as to what the maximum sentence could be. The maximum sentence for a Class C felony in Oregon is 5 years, but considering sentencing guidelines and time served, it appeared that sentencing would be likely to result in confinement of less than a year. Although Mr. Lopes had been confined for a length of time comparable with the time he would have served had he been convicted, the state argued that his "conviction would serve governmental interests beyond confinement [including] 'the ability to ensure that [Mr. Lopes] receives supervision and treatment in the community if found guilty, thereby assisting [him] in avoiding similar behavior in the future'" (*Lopes*, p 527). The Oregon Supreme Court, however, found that the trial court records were insufficient in addressing the government's interests in further confining Mr. Lopes. Therefore, the Supreme Court of Oregon held that the trial court erred in entering the *Sell* order and issued a peremptory writ of *mandamus*.

Discussion

In *Sell*, the United States Supreme Court held that the four requirements for the involuntary medication of defendants when administered for the sole purpose of restoration of trial capacity are not to be balanced; instead, each of the requirements must be independently met.

The first requirement is that an important government interest be at stake. In *Sell*, the United States Supreme Court held that courts must consider each case's facts in evaluating the government's interest because special circumstances may lessen its importance. Although the Supreme Court of Oregon acknowledged the trial court's finding that Mr. Lopes had been charged with a serious crime, the question remained as to whether the presence of special circumstances lessened the state's interest. As the trial records were deemed insufficient, the Supreme Court of Oregon held that the trial court did not adequately demonstrate that "the state's continuing interest in restoring relator's competence and potentially convicting him are so important that they justify relator's involuntary medication" (*Lopes*, p 528).

Although the first factor of *Sell* was not met, thus requiring the trial court to vacate its *Sell* order, the Oregon Supreme Court went on to address the remaining *Sell* factors. The second factor is that "the administration of medication is substantially likely to render [Mr. Lopes] competent to stand trial and that such medication is substantially unlikely to have side effects that will interfere significantly with [Mr. Lopes'] ability to assist counsel" (*Lopes*, p 528). The trial court did not indicate whether the evidence presented met the clear-and-convincing standard of proof that is borne by the state in *Sell* hearings. Further review of the hearing record showed that Mr. Lopes' diagnosis had been delusional disorder, persecutory type. The treating psychiatrist testified there was a "30 to 40 percent" rate of successful treatment of that disorder with antipsychotic medication, and opined that the medications were "worth trying." However, the *Sell* standard was not met because the state failed to present clear and convincing evidence that involuntary medication was "substantially likely" to restore fitness (*Lopes*, p 530).

This *Sell* requirement underscores the great difference between the stringent proof of a medication's efficacy demanded by *Sell* and the more relaxed standard of efficacy that is allowed in clinical practice when initiating a course of medication. The clinical approach of trying alternative medications with careful observation for possible efficacy may be justification for a trial of medication, but it is not sufficient to meet *Sell's* legal standard for involuntary medication. Thus, it is critical that the mental health professional who is called to testify in support of forced administration of a medication be prepared to offer drug efficacy testimony that meets the clear-and-convincing standard of proof demanded by *Sell.*

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Choosing Not to Pursue a Mental Health Defense in a Capital Case

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Reliance Upon "Remorse" Rather Than a Mental Health Defense Is Held to be a Reasonable Defense Strategy

Clark Elmore pleaded guilty and was sentenced to death for the rape and murder of his stepdaughter. In subsequent appeals, he argued many claims, including ineffective assistance of counsel. His claims were fully litigated through the Washington state court system and were dismissed on direct appeal. Mr. Elmore then filed a collateral petition citing failure of his counsel to present a mental health defense in mitigation. The Washington Supreme Court ruled against that claim, upholding the capital sentence. Mr. Elmore then filed a *habeas* petition in U.S. district court, again claiming ineffective counsel for failure to explore more fully mitigating evidence regarding possible mental illness, brain damage, or both. The U.S. District Court for the Western District of Washington denied the petition. Mr. Elmore appealed to the Ninth Circuit Court of Appeals, again arguing that counsel's failure to explore a mental health/brain damage defense constituted ineffective assistance of counsel (*Elmore v. Sinclair*, 781 F.3d 1160 (9th Cir. 2015)).

Facts of the Case

On April 17, 1995, Clark Elmore brutally raped and murdered his 14-year-old stepdaughter after an