ment's interest in bringing Gomes to trial [387 F.2d at 161; interior quotation marks omitted].

The appellate court wasted few words in sustaining the trial court's forced medication under the remaining three *Sell* criteria. Psychiatric testimony had been given to the effect that (1) Bureau psychiatrists had a "70 percent success rate" in restoring detainees to competence with antipsychotic medication and (2) "potential side effects of medication are substantially unlikely to handicap Gomes in assisting in his own defense" (387 F.2d at 161–2). Therefore, forced medication would "significantly further" the government's interest in trying Gomes. "[A]lternative, less intrusive treatments" would be unlikely "to achieve substantially the same results," in the *Sell* language, the court concluded, based on psychiatric testimony that "verbal therapy. . .would be ineffective," due to Gomes' delusional lack of insight and "distorted perception of reality" (387 F.2d at 162). And finally, the appellate court upheld the trial judge's finding that the medication was "medically appropriate," evidently on the basis of the treating psychiatrist's testimony that "Gomes's condition 'is such that he needs . . .treatment [with] anti-psychotics. It is medically appropriate to treat a debilitating illness' " (387 F.2d at 163).

Therefore, forced medication to restore competence in this case survived the *Sell* gauntlet.

Discussion

Gomes reveals the *Sell* criteria to be essentially illusory, likely deriving from the law's enduring misunderstanding of psychiatry. Trial courts are consigned to nailing jelly to a tree.

In this case, for instance, the trial court endorsed psychiatric testimony of a "70 percent success rate" in treating psychosis—not necessarily Delusional Disorder, which was Gomes' diagnosis—based on judicial competence rulings as the outcome measure. As science, of course, this is problematic. The court also credited testimony that "the side effects. . .would likely subside within three to four days after treatment begins" (387 F.2d at 162). Further, the court sharply distinguished neuroleptic from atypical drugs on the basis of a risk of neuroleptic malignant syndrome (NMS) with the former, and implied that they would therefore be categorically unacceptable. If this makes sense, how do neuroleptic drugs remain on the market? How many cases of NMS does the court imagine a psychiatrist sees each week?

Finally, in rejecting Gomes' argument, under *Sell*'s fourth criterion, that forced antipsychotic medication is not "medically inappropriate" because "it will not be properly supervised after he is transferred from [the medical facility] to prison," the court apparently accepted psychiatric testimony that there can be no problems "once a patient has reached a stable dosage; by the time Gomes returns to prison, the only monitoring needed will be to ensure that he takes the medicine" (387 F.2d at 163).

The prospect that such a kaleidoscopic version of psychiatry will promote rational adjudication is a tough *Sell*.

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Involuntary Medications Not Allowed to Restore Competence to Stand Trial

In *United States v. Ghane*, 392 F.3d 317 (8th Cir. 2004), the Eighth Circuit Court of Appeals decided that a pre-trial detainee, incompetent to stand trial due to hard-to-treat psychopathology (Delusional Disorder), cannot be medicated involuntarily because *Sell v. United States*, 539 U.S.166 (2003), requires that medication be "substantially likely" to restore competence.

Facts of the Case

Hessam Ghane, a 54-year-old resident of suburban Kansas City, Missouri, was admitted to an emergency department for depression with suicidal ideation. He told hospital staff that he had potassium cyanide at home for the purpose, having stockpiled it from a past job as a chemist. The hospital notified police, who, with Ghane's consent, searched his home and found the potassium cyanide under his kitchen sink.

Ghane was charged federally with possession of a chemical weapon, a seeming overreaction perhaps attributable, post-9/11, to Ghane's being an immigrant from the Middle East. He probably did not help his cause by giving police the multiple-choice explanation that he planned to use the contraband

for suicide, or for conducting experiments, or for teaching purposes.

The federal magistrate, after a hearing, found Ghane incompetent to stand trial. A few weeks later, a forced-medication hearing was held, with psychiatric testimony that Ghane's Delusional Disorder (persecutory type) had a 10 percent chance of responding. The magistrate found that this satisfied the *Sell* requirement that medication be "substantially likely" to restore competence and issued an order for involuntary medication. Ghane appealed.

Ruling and Reasoning

Under *Sell*, four factors must be established before an order for involuntary medication to restore competence may be issued:

> First, a court must find that. . .[t]he Government's interest in bringing to trial an individual accused of a serious crime is important. . . . Second, the court. . .must find that administration of the drugs is substantially likely to render the defendant competent to stand trial [and] that. . .the drugs [are] substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense. . . . Third, the court must conclude that involuntary medication is *necessary* to further those interests. . . . Fourth, . . .the court must conclude that administration of the drugs is *medically appropriate*. . . [539 U.S. at 180–2; emphasis in original].

In *Ghane*, the Eighth Circuit stated that "[t]he second and fourth *Sell* factors are at issue here": whether the medication is "substantially likely" to succeed and whether it is "medically appropriate" (392 F.3d at 319). Curiously, the court never mentioned the fourth factor again.

As to the second factor, "substantially likely," the court first noted that the Supreme Court in *Sell* had neglected to address the standard of proof. That omission notwithstanding, a 10 percent chance of success is not "substantially likely" under any standard, the court declared, reversing the order for involuntary antipsychotic medication:

> We cannot accept that a "glimmer of hope" for. . .restored competence rises to the level of "substantial likelihood," as mandated by the Supreme Court's holding in *Sell*. A five to ten percent chance of restored competence cannot be considered substantially likely under any circumstances [392 F.3d at 320].

Discussion

The court cited *United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004), to illustrate the meaning of "substantially likely" to restore competence: 70 percent in *Gomes* is "substantially likely," whereas 10 percent in this case is not. Unfortunately, the court failed to notice, or perhaps simply elected not to acknowledge, that both cases involved exactly the same illness, Delusional Disorder (persecutory type). Unless antipsychotic medications are more efficacious in New England than in Missouri, this surely does not bespeak a coherent deployment of psychiatric expertise in the courtroom.

More troubling is *Sell*'s declaration that forced medication of seriously psychotic criminal detainees should be "rare" (539 U.S. at 180). The Supreme Court noted soothingly that lengthy incarceration or civil commitment can be counted on to keep the citizenry safe, even without (1) a trial to address the psychotic person's legal rights or (2) manifestly appropriate and needed psychiatric care for his or her disease.

Putting aside the problem of applying loose statistics, whether 10 percent or 70 percent, to individual cases, Delusional Disorder is notoriously treatment resistant. It is also, like so many psychiatric disorders, insight resistant, making coerced treatment often the only treatment.

Having forgotten the fourth *Sell* factor, "medically appropriate," the court sees only a "glimmer of hope" for the suicidal Mr. Ghane and, for that reason, blocks treatment. Ironically, the defendant in *Sell* itself, Charles Sell, also suffering from Delusional Disorder (persecutory type), has remained in custody since 1997, incompetent to stand trial and, under the *Sell* criteria, still unmedicated (MacCourt D, Stone AA: Caught in limbo between law and psychiatry. Psychiatr Times 22(7);1, 2005).

Can this make sense in a society that strives to be compassionate, just, and at least logical?

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A Defendant's History of Violence and Psychiatric Pathology Do Not Per Se *Necessitate a Competence Evaluation*

In *People v. Ramos*, 101 P.3d 478 (Cal. 2004), the California Supreme Court considered an appeal contending that the trial court in a capital case had erred