

## Defendants' Constitutional Rights Against Forced Medication in Sell Hearings

### ***Court Holds That Defendant Has a Constitutional Right to Present Expert Rebuttal Testimony Against Government Experts Who Seek Forced Medication Order in a Sell Hearing***

In *U.S. v. Rivera-Guerrero*, 426 F.3d 1130 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that the district court erred when it denied the defense's request for a continuance to obtain an independent medical expert to rebut the testimony of the government's expert witnesses who sought an order to medicate the defendant involuntarily so as to render him competent to stand trial. Taking the opportunity to review the jurisprudence on involuntary medication, the Ninth Circuit wrote broadly and articulated defendants' constitutional safeguards against unwanted medication.

#### *Facts of the Case*

Abisai Rivera-Guerrero (Rivera) was arrested on September 14, 2003, for illegal reentry after deportation, a felony under federal law that carries a maximum penalty of two years' imprisonment. When Rivera failed to appear for his preliminary hearing, the magistrate judge granted his counsel's request for a competency evaluation. He was found incompetent to stand trial, as he had been on two prior occasions, and was committed to a Federal Medical Center (FMC) for evaluation on November 25, 2003.

A status hearing was held on February 6, 2004, at which the FMC doctors reported that Rivera's thought process was disorganized and he had exhibited several instances of hostility, though he was not sufficiently dangerous to warrant emergency medication, as he was being held in isolation. Rivera, they concluded, needed forced medication to render him competent to stand trial and to allow him to enter the FMC general population safely. All parties agreed that the subsequent medication hearing should be held pursuant to *Sell v. U.S.*, 539 U.S. 166 (2003), and the magistrate judge explicitly addressed each of the four factors laid out by the Supreme Court in *Sell*. All parties had an opportunity to question the FMC

experts and present argument. Rivera requested a continuance to consult with independent medical experts and seek an expert to rebut the FMC experts' testimony. The request was denied, the magistrate judge issued an order permitting the use of involuntary medication to restore competency, and the commitment to the FMC was extended.

Rivera appealed the magistrate's order to the district court, arguing both the legal matter that the magistrate judge lacked authority to issue the medication order and contesting the order on its merits. The district court ruled that the magistrate judge had authority to issue the medication order, declaring it a "non-dispositive collateral matter." Reviewing the decision under the "clear error" standard, the district court affirmed the magistrate judge's order and found that the magistrate judge's denial of a continuance did not violate Rivera's due process rights. Rivera appealed to the Ninth Circuit.

On July 20, 2004, the Ninth Circuit issued the first of two opinions in the case. Never reaching the merits, the Ninth Circuit found that Rivera had important constitutional rights at stake in avoiding involuntary medication; once medicated, his rights may have already been violated. Therefore, it was improper for the magistrate judge to issue the order, and the Ninth Circuit vacated the order and remanded the case to the district court with instructions to consider it *de novo* and to treat the magistrate judge's order as "proposed findings and recommendations."

On August 31, 2004, after Rivera had spent nearly a year confined without medication at the FMC, antipsychotic medication was initiated emergently because of a claim of dangerousness. On October 4, 2004, upon remand, the district court issued an order adopting the magistrate judge's "recommendations" and noted that the original request for a stay of the medication order was moot, as Rivera was receiving medication. Rivera again appealed to the Ninth Circuit.

#### *Ruling and Reasoning*

The Ninth Circuit found that the district court erred in refusing Rivera's request for a continuance before issuing a medication order. The court's reasoning stemmed from the law on involuntary medication, which was reviewed in their decision.

The court noted that the Supreme Court has recognized a "liberty interest in freedom from unwanted antipsychotic drugs" in three cases. Most recently,

the Court took elements from *Riggins v. Nevada*, 504 U.S. 127 (1992), concerning a criminal defendant's right to refuse antipsychotic medication, and elements from *Washington v. Harper*, 494 U.S. 210 (1990), concerning an inmate's right to freedom from antipsychotic medication, absent dangerousness or grave disability, and created the four-pronged *Sell* test. The government may be permitted to administer involuntary medications to a defendant to restore competency to stand trial if the treatment is (1) medically appropriate, (2) the least intrusive option, (3) unlikely to have side effects that undermine the fairness of trial, and (4) necessary to further important governmental interests. The last criterion is a legal one, requiring a court to balance the defendant's constitutional rights against the government's claimed justification.

The Ninth Circuit previously held in *U.S. v. Williams*, 356 F.3d 1045 (9th Cir. 2004), that due to the "deep-rooted constitutional rights" at stake "a court that is asked to approve involuntary medication must be provided with a complete and reliable medically informed record, based in part on independent medical evaluations, before it can reach a constitutionally balanced *Sell* determination." In denying Rivera's request for a continuance, the district court prevented the development of a complete record necessary for a full and fair hearing; absent such a hearing, the defendant could not be involuntarily medicated.

In October 2005, the Ninth Circuit reversed the district court's denial of the continuance, vacated the involuntary medication order, and remanded with specific instructions on how to proceed. By then, Rivera had been committed to the FMC for nearly two years (and had been involuntarily medicated for more than a year) for a crime with a maximum two-year sentence. The district court was instructed to obtain a status report from the FMC "promptly." If competency was restored, the government may proceed with the trial at its discretion. If not, Rivera must be civilly committed, deported, or released unconditionally.

#### Discussion

Two points are worth consideration. First, this ruling is likely to have broad effects on courts' consideration of requests for involuntary medication. It directs courts to give wide latitude to defense counsel to allow independent medical experts to create a complete and reliable medical record, necessary for

the court's balancing of interests under *Sell*. The ruling reemphasized that *Sell* orders should be disfavored and that courts should explicitly consider alternative grounds for involuntary medication (such as those articulated in *Riggins* or *Harper*) before issuing a *Sell* order. Finally, it prohibits magistrate judges from issuing involuntary medication orders—at least under *Sell*.

Second, the Ninth Circuit's characterization of psychiatric treatment for incompetent defendants is noteworthy. The Ninth Circuit characterized the medication treatment plan as an "experiment" on Rivera to try to find an effective antipsychotic agent, although it is unclear from the decision whether the FMC psychiatrist used that word in his testimony. The Ninth Circuit noted that the doctor "did not state that such experimentation would have a significant likelihood of rendering the defendant legally competent" and that in the doctor's personal experience, "antipsychotic medications had been successful in restoring to competency only three patients." However, the record reflected that the government expert had testified that a Bureau of Prisons study revealed that 76 percent of incompetent defendants were restored to competency with antipsychotic medications.

In support of their request for a continuance, the defense submitted a large collection of articles demonstrating views opposing those of the FMC doctors. The district court would not admit these into evidence because there was no medical expert to lay a foundation, but the Ninth Circuit referred to two articles specifically, "The Case Against Antipsychotic Drugs: A 50-year Record of Doing More Harm than Good," *Medical Hypotheses* 62:5, 2004 and "Are There Schizophrenics for Whom Drugs May Be Unnecessary or Contraindicated?" *International Pharmacopsychiatry* 13:100, 1978, in reaching this conclusion:

These articles suggest that a respectable, though minority, portion of the medical community strongly believes that antipsychotic medications cause long-term and irreversible harm and have a high chance of producing trial-related and even fatal side effects, and that such drugs are not universally considered medically appropriate in light of other alternative treatments.

In *Rivera*, the Ninth Circuit took the opportunity to reemphasize their stance, echoing the Supreme Court as articulated in *Sell*, that courts must be assiduous in protection of an individual's constitutional right to refuse medication. Because of the legal

balancing required of significant constitutional protections under *Sell*, the Ninth Circuit found that it is not within a magistrate judge's purview to issue a *Sell* order. *Sell* orders are legally disfavored as there are "often strong reasons for a court to determine whether forced administration of drugs can be justified on . . . alternative grounds before getting to the competence question." A dangerousness inquiry under *Harper*, for example, is deemed more "objective and manageable" since it does not require the inherently subjective balancing of defendants' rights with the state's interest in prosecution.

To perform the legal balancing required under *Sell*, a court must have a complete, fair, and medically informed record. If such a balancing is unavoidable, *Rivera* demands that a defendant be given wide latitude to present expert testimony to rebut government experts to create such a record.

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## Mental Illness and Revocation of Restricted Probation

### ***Trial Court Did Not Abuse Discretion by Imposing a Maximum Prison Term on a Defendant Upon a Finding That the Defendant's Mental Illness Was Unlikely to Respond to Treatment and That the Defendant Was a "Risk to Reoffend Violently"***

In *State of Montana v. Burke*, 122 P.3d 427 (Mont. 2005), William James Burke appealed his sentencing to the Montana Department of Corrections, following the revocation of his probation, alleging abuse of sentencing discretion by the district court of the Eighth Judicial District, Cascade County, Montana. Burke argued the court made an error by not finding him unable to conform his behavior to the requirements of the law. In support, he pointed to expert testimony indicating his "volitional control was greatly impaired by the illnesses" and

that the most appropriate place for treatment of his mental illnesses would be the state hospital.

### *Facts of the Case*

After Burke made a plea agreement to a count of robbery in 2001, the district court of Cascade County sentenced him to the Department of Corrections for seven years, with four years suspended. Burke was released from prison on February 14, 2004, having served three years and then began his four-year term of probation. Various conditions applicable to the suspended portion of his sentence were stipulated. On May 18, 2004, Burke's probation officer, Scott Brotnov, filed a Report of Violation, alleging that Burke had violated eight different conditions of his probation.

After the state filed its Petition for Revocation of Suspended Sentence and the district court issued a warrant for Burke's arrest, he appeared before the court on June 10, 2004, denying each of the alleged probation violations and requesting by motion a confidential mental health evaluation, which was granted. Dr. Michael Scolatti, a licensed clinical psychologist, performed an evaluation of Burke and rendered a diagnosis of antisocial personality disorder, borderline intellectual functioning, bipolar disorder with psychotic features, and attention deficit/hyperactivity disorder (ADHD). Furthermore, he reported that Burke's bipolar disorder and ADHD were "relatively severe disorders that require medication" and illnesses that would significantly compromise his ability to conform to the law. He opined that Burke should be placed at the state hospital.

On September 7, 2004, during an evidentiary and dispositional hearing held by the district court, Burke admitted to violating five conditions of his probation. Thereafter, Scolatti testified to some uncertainty as to Burke's ADHD diagnosis, and the impact that Burke's mental illnesses would have on his ability to conform to the requirements of his probation. He again opined that the state hospital, as opposed to prison, would provide the best setting for treatment of Burke's conditions. At the conclusion of the testimony, the state argued that the district court should revoke the suspended portion of Burke's sentence and order that he serve the suspended portion of his sentence, four years, in prison. Burke's counsel conceded that there were probation violations and the suspended sentence should be revoked but argued that the district court should instead commit