"compelling state interest." As clearly stated in its decision, the court felt that the protection of the public from sexually dangerous persons must be preserved, even if such protection requires an adversarial hearing involving an incompetent defendant. Furthermore, it argued, the hearing described under Massachusetts statute is a civil proceeding. As such, constitutional safeguards normally provided to criminal defendants, such as due process, do not necessarily apply.

Discussion

In *Burgess*, the court held that lack of competence to stand trial was not sufficient reason to shield the defendant from an adversarial nonjury trial to determine, beyond a reasonable doubt, guilt of sexual offenses. Such findings of guilt are ostensibly to be used in subsequent civil commitment hearings to determine sexual dangerousness. Several concerns brought up in this decision are worth closer examination by the forensic psychiatric community.

Most prominently, this holding continues the complex but important dialogue regarding the assessment and treatment of those deemed sexually dangerous. Although Mr. Burgess' long duration of pretrial commitment (11 years), presumably for restoration to competence to stand trial, is worthy of note, the holding that incompetent defendants can be subjected to a trial, jury or nonjury, is even more controversial. While the Massachusetts statute, on its face, is a civil statute, careful consideration must be given to its resemblance to criminal statutes. It does, in fact, allow for an adversarial hearing to determine guilt of a crime beyond a reasonable doubt. Again, this guilt is not admissible in future criminal proceedings, but it is admissible in future commitment hearings.

Furthermore, it is important to note that the risk assessment of those suspected to be sexually dangerous rests squarely on their history of sexual offenses. In cases such as this, the history is only alleged, and no criminal court has found the defendant guilty of his supposed crimes. It is also worth noting that this risk factor (i.e., history of having committed a sexual offense), is a static risk variable, and use of it may result in widespread long-term detention of those assessed.

Given the current national debate regarding sexual commitment laws, these questions raise concern that such commitments appear to be penal as opposed to therapeutic. The forensic psychiatric community must continue to consider these concerns as it explores its level of comfort with commenting on the sexual dangerousness of defendants.

Involuntary Medication to Render a Defendant Competent to Stand Trial

Karla Blackwood, MD
Fellow in Forensic Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

Harper-like Dangerousness Assessment Must Precede a *Sell* Hearing as a Condition for Forced Medication to Render a Defendant Competent to Stand Trial

In *U.S. v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008), the court considered the defendant's appeal of the lower court's order, following a *Sell* hearing, that he be forcibly medicated to render him competent to stand trial. While assessing the sufficiency of the *Sell* hearing, the appellate court also held that a *Harper*-like dangerousness assessment must be made as a condition antecedent to a *Sell* hearing. The appellate court construed the language of the Supreme Court's decision in *Sell v. U.S.*, 539 U.S. 166 (2003), to mandate an initial consideration of "dangerousness" as a basis for forced medication of a defendant, before relying on a *Sell* hearing. The circuit court remanded the case to the trial court with specific instructions.

Facts of the Case

Jose Hernandez-Vasquez was indicted January 28, 2004, for illegal reentry after deportation, a U.S.C. § 1326 charge, subject to a maximum prison term of 20 years. Mr. Hernandez-Vasquez had previous convictions for aggravated assault on a corrections officer in Arizona and for lewd and lascivious acts with a minor child, for which he had received a three-year custodial sentence, and misdemeanor convictions for trespassing and annoying children. He was ordered

to be deported August 1, 2003, and was removed from the United States on November 8, 2003.

Mr. Hernandez-Vasquez filed for a competency examination on May 6, 2004, and at a subsequent district court hearing was found incompetent to stand trial. He was then transferred to the United States Medical Center for Federal Prisoners in Springfield, Missouri. The government then filed a motion to medicate him forcibly, to render him competent to stand trial. The government also requested an order for Mr. Hernandez-Vasquez to be assessed for dangerousness. At a hearing on March 24, 2006, the district court granted the government's motion to medicate Mr. Hernandez-Vasquez involuntarily, for the sole purpose of rendering him competent to stand trial. Mr. Hernandez-Vasquez appealed the order and on April 5, 2006, the Ninth Circuit stayed the involuntary medication order, awaiting the outcome of the appeal.

Ruling and Reasoning

The Ninth Circuit found that the district court made a medication decision pursuant to factors in *Sell*, but first failed to address dangerousness as an appropriate alternative basis for forced medication under the conditions set forth in *Washington v. Harper*, 494 U.S. 210 (1990). In *Sell*, the U.S. Supreme Court held that only under limited circumstances could a court order involuntary administration of medication to render a defendant competent to stand trial. The *Sell* Court prescribed a four-factor test to be met before a defendant could be forcibly medicated: "important government interests [must be] at stake" (a legal criterion); there must be a substantial probability that the medication will enable the defendant to become competent without side effects that will undermine the defendant's ability to participate in his defense; medication must be necessary and an alternative and less intrusive procedure would not produce the same results; and the administration of the drugs must be medically appropriate.

In *Washington v. Harper* (1990), the Court held that forced medication could be ordered only when the defendant is a danger to himself or others and when the medication is in the defendant's best interest. In a similar case, *Riggins v. Nevada*, 504 U.S. 127 (1992), the U.S. Supreme Court held that forced medication of a defendant during trial violated the individual's Sixth and Fourteenth Amendment rights when there had been no finding that involuntary medication was necessary to a government interest. Although *Sell* created an independent basis for forced medication, the Court also directed that if the *Sell* hearing court does not first conduct a *Harper*-type inquiry then it should state on record why it is not doing so.

In the present case, a *Sell* inquiry was undertaken merely on the government's stating that it was not relying on the *Harper*-based grounds of dangerousness. Although both parties had agreed to proceed directly to a *Sell* hearing, the Ninth Circuit emphasized that the district court should separate the *Sell* inquiry from a *Harper*-type inquiry and that the hearing court "should not allow the two to collapse on each other" (*Hernandez-Vasquez*, p 919). The court noted that medical opinions under *Sell* testing are multipronged, hence more prone to error and therefore disfavored. "A defendant's liberty interest in avoiding unnecessary involuntary medication is too important to allow for situations in which the court is asked to undertake the more error-prone analysis for what may be arbitrary or tactical reasons" (*Hernandez-Vasquez*, p 915).

The Ninth Circuit Court also held that the district court failed to meet the *Sell* standard, in that its medication order lacked specificity and was too broad. The order provided only that "the method of treatment and type of medication to be used should be at the discretion of the treating medical professionals within the Bureau of Prisons" (*Hernandez-Vasquez*, p 917). The appellate court held that *Sell* requires the medication order to identify for the particular defendant the specific medication or range of medications, the maximum dosages to be administered, and the duration of time involuntary treatment can continue without updating the court on the defendant's mental state. It held that the district courts should not delegate unrestricted authority to physicians; however, their restrictions should be "broad enough to allow the treating physician flexibility in responding to changes in the defendant's condition" (*Hernandez-Vasquez*, p 917). The ruling also allowed for the government or the defendant to request a motion to alter the order as the defendant's clinical status changes.

The opinion also addressed the proper standard of review for both the first and second *Sell* factors. Noting a split among jurisdictions, the Ninth Circuit joined the Second Circuit in holding that the first *Sell* factor constitutes a legal question and so would

be reviewed *de novo*. The second *Sell* factor was held to be a factual one to be reviewed by a clear-error standard.

Discussion

This case makes two important points: first, there must be a clearly defined procedure that the government should use when seeking to medicate a defendant involuntarily—a *Harper*-type dangerousness inquiry initially and then, if need be, a *Sell* inquiry. The appellate court explicitly stated that the consideration of a medication order based on dangerousness is preferable to a consideration of a medication order solely to render the defendant competent to stand trial. The court noted that dangerousness assessments are more objective and manageable than the multifactor fact-findings required by the *Sell* test.

The Ninth Circuit, in emphasizing the importance of first evaluating for dangerousness, noted that such an evaluation could help inform subsequent *Sell* inquiries. "Even if a court decided medication cannot be authorized on the alternative grounds, the findings underlying such decision will help inform expert opinion and judicial decision making in respect to a request to administer drugs for trial competence purposes" (*Hernandez-Vasquez*, p 914).

The court emphasized the challenge that *Sell* fact-finding presents to the psychiatric experts. While some of the discussion seemed solicitous of the doctors' concerns, there was concomitant, though more subtle, concern with the risk of unreliability of medical opinion when it concerns the multifaceted considerations that *Sell* assessments require. The court's uneasiness with expert opinion is further indicated in their holding that *Sell* requires that doctors not be given free discretion to make medication plans absent close court supervision and clear specification of type, dosage, and duration of medication strategies. The court's words in this regard exemplify the oft-remarked-upon uneasiness that courts voice toward psychotropic medications:

> A broad grant of discretion to medical professionals also risks distracting such professionals from *Sell's* narrow purpose of restoring a defendant's competency for trial. See *Sell*, 539 U.S. at 185 ('The failure to focus upon trial competence could well have mattered. Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence, but not necessarily relevant when dangerousness is primarily at issue.') (internal citation omitted). *Sell* appears to anticipate physicians' resistance to specific judicial direction regarding treatments that are acceptable for the purpose of rendering a defendant competent to stand trial [*Hernandez-Vasquez*, p 916].

The courts prefer *Harper* to *Sell* as a legal basis for imposing forced medication because they are clearly uneasy about forcing medication for the sole purpose of making a person competent to stand trial. With a thinner reed for the government's intrusion on the liberty interest, the Ninth Circuit demonstrates a reluctance to impose forced medication and so urges lower courts to use *Sell* sparingly and compels psychiatrists to be constrained in the discretion they use in prescribing medications.

NGRI Acquittals

Michael Yoo, MD, MPH
Resident in Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

NGRI Finding Precludes Any Legal Basis to Appeal Either the Underlying Elements of the Crime or the Determination That the Defendant Is NGRI

In *People v. Harrison*, 877 N.E.2d 432 (Ill. 2007), Dwight Harrison appealed the trial court's finding of not guilty by reason of insanity (NGRI) in the commission of a first-degree murder. Mr. Harrison claimed both insufficiency of the state's evidence and ineffective assistance of his counsel. The appellate court, however, dismissed the appeal, holding that the NGRI judgment constituted a general acquittal and that no legal issue remained, rendering the appellant's claims moot.

Mr. Harrison appealed this ruling to the Supreme Court of Illinois, where he argued that an NGRI finding was not a full acquittal, but instead was similar to a finding of guilty but mentally ill, a finding that allows for appellate review. He argued further that his civil commitment subsequent to the NGRI verdict implicated his federal Fourteenth Amendment liberty interests and so he was still legally aggrieved. The Illinois Supreme Court disagreed, affirming the ruling of the appellate court.