

Fifth and Fourteenth Amendments. Citizens may not be deprived of life, liberty, or property without due process of law. Procedural due process protects citizens by ensuring appropriate legal procedures take place such as a notice, a hearing, and an impartial decision maker. The concept of substantive due process is not found in the U.S. Constitution but is inferred. It protects individuals by requiring the state to demonstrate a sufficient substantive justification or a good enough reason to take away individuals' rights.

The concept of substantive due process has played an important role in many landmark mental health cases, including *Harper*, *Riggins*, and *Sell*. Those critical of decisions on the basis of substantive due process assert that there is no textual basis in the U.S. Constitution for such protections and that such matters should remain the purview of the more politically accountable branches of government, namely the legislature (White GE: *The Constitution and the New Deal*. Cambridge, MA: Harvard University Press, 2000). The substantive due process concept is likely to be revisited in future U.S. Supreme Court decisions, and perhaps recently appointed justices will join Justice Thomas in rejecting this concept. This may have an impact on future U.S. Supreme Court decisions involving psychiatry and psychiatric patients.

## Evidentiary Burden and Application of *Sell v. United States*

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### A *Sell* Hearing Requires Clear and Convincing Evidence to Involuntarily Medicate a Defendant

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**Key words:** competency to stand trial; correctional psychiatry; prisoners rights

In *United States v. James*, 938 F.3d 719 (5th Cir. 2019), the U.S. Court of Appeals for the Fifth

Circuit reviewed a district court's order to medicate a defendant involuntarily per *Sell v. United States*, 539 U.S. 166 (2003), and determined that the district court must meet the standard of clear and convincing evidence. On subsequent appeal in *United States v. James*, 959 F.3d 660 (5th Cir. 2020), the Fifth Circuit found that the *Sell* standard was applied correctly and affirmed the district court's decision to involuntarily medicate the defendant.

#### Facts of the Case

Susan Kirchoff James was arrested and indicted for emailing death threats to her aunt and uncle, in violation of 18 U.S.C. § 875(c) (1994). The district court held a hearing to determine if Ms. James was competent to stand trial as she believed that everyone involved in the proceedings, including her defense attorney, were conspiring against her. Dr. Tennille Warren-Phillips, a licensed psychologist at the Bureau of Prisons federal detention center in Houston, Texas, performed a court-ordered evaluation of Ms. James. Dr. Warren-Phillips delivered a diagnosis of "general personality disorder" and obsessive-compulsive disorder and opined that Ms. James was competent to stand trial. The defense disagreed and hired a forensic psychiatrist, Dr. Loretta Sonnier, to provide a second opinion regarding Ms. James's competency. Dr. Sonnier diagnosed schizoaffective disorder, bipolar type, and opined that Ms. James was incompetent to stand trial due to "fixed false beliefs" that "affect her judgment." In her report dated December 21, 2017, Dr. Sonnier wrote that antipsychotic medication would be "substantially likely" to restore Ms. James's competency to stand trial. Ms. James was found incompetent to stand trial by the district court on February 7, 2018, and was committed for restoration of competence to the Carswell Federal Medical Center in Fort Worth, Texas.

Ms. James refused medications while hospitalized. Dr. Hayley Blackwood, a forensic psychologist, delivered a diagnosis of delusional disorder, persecutory type, and reported to the district court that Ms. James would require medication to be restored to competency. After evaluating Ms. James, Dr. Gary Etter, a Bureau of Prisons psychiatrist, proposed a treatment plan that included a long-acting antipsychotic medication, risperidone. Dr. Jose Silvas, another Bureau of Prisons psychiatrist who independently evaluated Ms. James, agreed with the plan.

Chief Psychiatrist Dr. Judith Cherry led a Bureau of Prison's administrative hearing and agreed with the team's report, noting that antipsychotic medication "is recognized as effective and safe treatment for delusional disorder (*James*, p 665). The government then requested a *Sell* hearing to medicate Ms. James involuntarily, which was held January 10, 2019. Dr. Blackwood and Dr. Silvas both testified at the *Sell* hearing that medication was necessary to restore Ms. James' competency to stand trial.

The district court determined that the government had met its burden under *Sell* and granted permission for involuntary treatment, as well as extending Ms. James' confinement for an additional six months. Ms. James had been in custody for two years by this time. The district court order was stayed pending Ms. James's first appeal to the Fifth Circuit in 2019. Ms. James argued that the government's evidentiary burden, which was not addressed in *Sell*, should be clear and convincing evidence. The Fifth Circuit agreed but could not determine what standard the district court applied. The Court of Appeals vacated the involuntary treatment order and remanded to the district court to apply the clear and convincing standard. The district court clarified that it had applied this standard and again granted authorization for involuntary treatment.

Ms. James appealed a second time, arguing that the district court had not met the four factors outlined in *Sell* necessary for involuntary administration of medication to restore competency to stand trial.

#### Ruling and Reasoning

The Fifth Circuit Court of Appeals held that the district court properly granted authorization to administer antipsychotic medication for the sole purpose of restoring Ms. James's competency to stand trial and outlined their reasoning on a point-by-point basis per the four *Sell* factors.

First, Ms. James argued that the government did not prove it had important interests at stake as her case represented a "special circumstance," which, as described in *Sell*, could lessen the importance of interest in bringing a defendant to trial. For example, confinement in an institution for the mentally ill reduced the risk of releasing a guilty defendant without punishment and confinement that had

occurred prior to trial could be considered during sentencing as time served. Ms. James pointed out that she had already been confined for half of the maximum possible sentence and could potentially be civilly committed as an alternative to imprisonment. The court disagreed and determined that Ms. James's situation did not constitute a special circumstance, noting that it was not enough that Ms. James could be potentially committed and that her civil commitment must be certain for the government's prosecutorial interest to be lessened. In addition, the fact that Ms. James would serve little prison time did not lessen the interest in prosecution as government interest extended beyond punishment to "trying her and vindicating the law publicly" (*James*, p 664).

Second, Ms. James argued that the government did not prove that involuntary medication would significantly further its interest in bringing her to trial. To prove this interest, the government must show that the proposed medication would be substantially likely to restore competence while not interfering with Ms. James' ability to assist in her defense. Ms. James believed that the government's burden was not met as there was no explanation of the mechanism or statistical probability of successful restoration, and the prosecution prompted Dr. Silvas with the term "substantially likely" during the hearing. The court disagreed, citing the reports of Dr. Etter and Dr. Cherry and the testimonies of Dr. Blackwood and Dr. Silvas as sufficient evidence that treatment would likely restore Ms. James's competence without interfering in her ability to assist in her defense.

Third, Ms. James argued that the government did not prove that medication was necessary to further its interest. To do this, the government must show that alternative, less intrusive treatments were unlikely to achieve substantially the same results as medication. Ms. James maintained that the government "did not appear to have even considered the possibility of alternative treatment" (*James*, p 667) and did not support the government's assertion that no other intervention could treat her diagnosis of delusional disorder. The court disagreed, noting that it was irrelevant whether alternative treatment had been attempted or considered, but only that it would be unlikely to achieve substantially the same results as medication.

Fourth, Ms. James argued that the government had not proved that the proposed medication was medically appropriate. To do this, the government must show that medication is in the defendant's long-term medical interest and not just the government's short-term interest of bringing the defendant to trial. Ms. James argued that the government provided no evidence as to how the proposed medication would be in her long-term interest as her treatment was expected to be short, and that there was no distinction between any short-term medical benefit and the nonmedical interest to resolve her case. The court disagreed, noting this incorrectly assumed that the government's interest in restoring competency was separate from Ms. James's medical interest as restoring her competence would also be to her own benefit.

#### Discussion

In *U.S. v. James*, 959 F.3d 660 (5th Cir. 2020), Ms. James directly challenged all four *Sell* factors. As outlined in *Sell*, the government must meet four factors before it may involuntarily administer antipsychotic medications to restore a defendant's competency to stand trial: that important government interests are at stake, e.g., bringing a criminal defendant to trial; that involuntary medication will significantly further those interests by rendering the defendant competent to stand trial without side effects that would hinder the defendant's ability to assist in the defense; that involuntary medication is necessary to further those interests and that less intrusive treatments would be unlikely to achieve the same results; and that administration of the medication is medically appropriate. Psychiatrists should consider these factors when approaching restoration of competency and documenting their rationale for treatment over objection.

Evidentiary burden was not addressed in *Sell*. In both *U.S. v. James* cases, the Fifth Circuit Court of Appeals joined nine other circuit courts in establishing clear and convincing evidence as the required standard under *Sell*. In *U.S. v. James*, 959 F.3d 660 (5th Cir. 2020), the court found that the government had presented detailed evidence of Ms. James' interests in the treatment plan and, consequently, it was not clear error for the district court to find it met the clear and convincing threshold. This underscored the

importance of due process in restoration of competency to stand trial and reduced the likelihood of the U.S. Supreme Court revisiting *Sell*.

## Law School Applicants Disability Discrimination Claim Rejected

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### Eighth Circuit Upholds Law Schools Summary Judgment Because Applicant Failed to Show the School Rejected His Application Because of Discrimination Based on Mental Illness

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**Key words:** ADA; disability;; law school; pretextuality; mental illness

In *Power v. University of North Dakota School of Law*, 954 F.3d 1047 (8th Cir. 2020), Padraic Power sued the University of North Dakota School of Law (UND Law) under Title II of the Americans with Disabilities Act of 1990 (ADA, 42 U.S.C. § 12101 (2008)), arguing his law school application was rejected based on mental illness. The district court granted summary judgment to UND Law because Mr. Power failed to show that the law school's legitimate, nondiscriminatory reason for rejecting his application was pretext for discrimination. Mr. Power appealed to the Eighth Circuit Court of Appeals, which affirmed the district court's judgment.

#### Facts of the Case

In the 2015–2016 academic year, UND Law received 300 applications, offered 204 positions, and enrolled 85 students. Associate Dean Bradley Myers and Professor Alexandra Sickler composed UND Law's admission committee. They consider several