Involuntary Medication of Competency to Proceed Patients

Andressa Medrado Dias Silveira, MD
Fellow in Forensic Psychiatry

Colleen Considine, MD
Fellow in Forensic Psychiatry

Jacqueline Landess, MD, JD
Clinical Assistant Professor of Psychiatry
Associate Program Director, Forensic Psychiatry Fellowship

Erik Knudson, MD
Clinical Assistant Professor of Psychiatry
Program Director, Forensic Psychiatry Fellowship

Medical College of Wisconsin
Department of Psychiatry
Milwaukee, Wisconsin

Wisconsin State Statute Held to Be Unconstitutional Because of Failure to Comply with *Sell* Standard

DOI:10.29158/JAAPL.210155-21

Key words: competency to stand trial; involuntary medication; *Sell*

In *State v. Fitzgerald,* 929 N.W.2d 165 (Wis. 2019), the Wisconsin Supreme Court held that the standard for ordering involuntary medication to restore competency set by Wis. Stat. § 971.14(3)(dm) and Wis. Stat.§ 971.14(4)(b) (2017-2018) was unconstitutional to the extent it required courts to order involuntary medication without addressing the criteria established in *Sell v. United States*, 539 U.S. 166 (2003).

Facts of the Case

Raytrell Fitzgerald was arrested and charged with unlawful possession of a firearm while he was subject to a harassment injunction. His competency to proceed was raised. The competency evaluator diagnosed Mr. Fitzgerald with schizoaffective disorder. He was ultimately found not competent to stand trial and committed to the state hospital for restoration. During a subsequent competency examination, the evaluator noted that Mr. Fitzgerald refused to take medication. The evaluator opined that Mr. Fitzgerald was not competent to refuse medication or treatment and that "[t]reatment with antipsychotic medication is known to be effective in treating symptoms of psychosis, which is precluding [Mr. Fitzgerald's] competence to proceed" (*Fitzgerald*, p 169). The circuit court found the evaluator's opinion persuasive and ordered the administration of involuntary medication to restore competency.

Following this ruling, Mr. Fitzgerald filed an appeal of the involuntary medication order. He challenged the constitutionality of Wis. Stat. § 971.14, specifically noting that the statute did not comply with the criteria for involuntary medication for competency restoration outlined in *Sell.* Under the state statute, involuntary administration of medication to restore competency may be granted when the defendant is incapable of understanding the advantages, disadvantages, or alternatives of accepting medication; or the defendant is incapable of applying understanding of those to the defendant's mental illness, developmental disability, or substance disorder. The state argued that the involuntary medication order followed the *Sell* criteria since the judicial Form CR-206, a preprinted form used by judges for involuntary medication orders for treatment to competency, contained the *Sell* criteria.

Mr. Fitzgerald petitioned to bypass the court of appeals for review of the involuntary medication order. The Wisconsin Supreme Court granted the petition. Before the Wisconsin Supreme Court heard the case, Mr. Fitzgerald was found competent; he pled guilty and was sentenced to time served. The state moved to dismiss Mr. Fitzgerald's petitions as moot. Given the importance of the matter, the Wisconsin Supreme Court denied the motion and heard the case.

Ruling and Reasoning

The Wisconsin Supreme Court held that Wis. Stat. § 971.14(3)(dm) and Wis. Stat.§ 971.14(4)(b) (2017-2018) did not comply with *Sell* and were therefore unconstitutional. More specifically, a patient could be ordered to receive involuntary medication to restore trial competence solely on the basis of lacking competency to refuse medication. This was a violation of due process. Citing *Washington v. Harper*, 494 U.S. 210 (1990), the court stated: "The mere inability of a

defendant to express an understanding of medication or make an informed choice about it is constitutionally insufficient to override a defendant's 'significant liberty interest in avoiding the unwanted administration of antipsychotic drugs'" (*Fitzgerald*, p 175, citing *Harper*, p 221).

The Wisconsin Supreme Court emphasized that Wis. Stat. § 971.14(3)(dm) and Wis. Stat.§ 971.14 (4)(b) do not require that an important government interest be at stake (the first *Sell* factor), they "merely require the circuit court to find probable cause that the defendant committed a crime—not necessarily a serious one" (*Fitzgerald*, p 175). The court also noted that the Wisconsin statutes do not require the circuit court to determine whether the medication is substantially likely to restore a defendant's competency or whether it could cause side effects that could interfere with the fairness of the trial (the second *Sell* factor). It requires only an opinion in the expert report about "the likelihood that the defendant, if provided treatment, may be restored to competency within the [statutory] time period" (*Fitzgerald*, p 176). The Wisconsin Supreme Court also noted that the Wis. Stat. § 971.14(3)(dm) and Wis. Stat.§ 971.14(4)(b) do not require the circuit court to determine whether the involuntary treatment is necessary to further important government interests (the third *Sell* factor). Finally, the Wisconsin Supreme Court determined that instead of the circuit court deciding whether the involuntary treatment is medically appropriate (the fourth *Sell* factor), the statutes delegate this task to "whoever administers the medication or treatment to the defendant" (*Fitzgerald*, p 176). Accordingly, the Wisconsin Supreme Court determined that the Wis. Stat. § 971.14(3)(dm) and Wis. Stat.§ 971.14(4)(b) set standards for involuntary medication for the purpose of competency restoration that fell below the minimal constitutional threshold as established by *Sell*.

The Wisconsin Supreme Court also rejected the state's argument that the judicially created Form CR-206 protected Mr. Fitzgerald's constitutional rights. The court stated: "A judicially created form cannot save a constitutionally infirm statute" (*Fitzgerald*, p 177). The court subsequently vacated the circuit court's order for involuntary medication.

Notably, the *Fitzgerald* concurrence emphasized that the Wis. Stat. § 971.14(2) allowed for alternative means to pursue involuntary medication other than *Sell*; specifically, if the defendant was dangerous. The justices noted that determination of dangerousness is likely an easier task for medical experts than evaluating the *Sell* factors.

Discussion

The Wisconsin law under consideration in *Fitzgerald* allowed competency patients to be involuntarily medicated solely on the basis of lacking capacity to consent to treatment. The Wisconsin Supreme Court ruled that this was unconstitutional because it violated due process by not comporting with minimal safeguards established by the U.S. Supreme Court *Sell* decision. As outlined in *Sell*, given the individual liberty interests at stake, the standard to involuntarily medicate a person for competency restoration is more rigorous than what must be proven in other circumstances, such as to involuntarily medicate a person because of dangerousness.

Interestingly, many state high courts have not directly addressed *Sell* in the 18 years since it was decided (Katz N. How the states can fix *Sell*: Forced medication of criminally ill defendants in state courts. Duke L.J. 2019; 69:735–773). Other states have revised their laws following *Sell* with some states even doing so before the *Sell* decision (Shannon B. Prescribing a balance: The Texas legislative responses to *Sell v. United States.* St. Mary's L.J. 2009; 41: 309–350; Norko MA, Cotterell MS, Hollis T: The Connecticut experience with *Sell* legislation. J Am Acad Psychiatry Law. 2020; 48(4):473-483). Though Wis. Stat. § 971.14 had been revised twice since the 2003 *Sell* decision, neither of these revisions incorporated the *Sell* factors. Following the *Fitzgerald* decision, a footnote was inserted in Wis. Stat. § 971.14 referencing the *Sell* criteria, though the actual text of the law has not incorporated *Sell*, and the capacity to consent language remains. In Wisconsin, confusion still exists regarding when and how to apply *Sell* with at least one subsequent appellate case requiring submission of a detailed treatment plan by the treating psychiatrist (*State v. Green,* No. 2020AP298-CR (Wis. Ct. App., Feb. 25, 2021)). In addition, despite the fact that *Sell* was to only be used in rare circumstances, many courts in Wisconsin do not authorize involuntary medication for competency defendants on alternative grounds, such as dangerousness.

In summary, the *Fitzgerald* case highlights certain problems arising from a lack of legislative response following *Sell*. This may well be the case in other states that have not taken a proactive approach to incorporating *Sell* into relevant law. Finally, as the *Fitzgerald* concurrence and *Sell* emphasized, states should still consider pursuing involuntary medication for competency patients by alternative means such as dangerousness, using a *Sell* hearing only in rare circumstances.

Sentencing for Cocaine Offenses

Amy Hasson, MD
Resident in Psychiatry

Jennifer Piel, JD, MD
Associate Professor of Psychiatry
Director, Center for Mental Health, Policy, and the Law

Department of Psychiatry
University of Washington School of Medicine
Seattle, Washington

The U.S. Supreme Court Ruled on Eligibility for Resentencing of Crack Cocaine Offenses under the First Step Act of 2018

DOI:10.29158/JAAPL.210156-21

Key words: resentencing; crack; cocaine; First Step Act

In *Terry v. United States*, 141 S.Ct. 1858 (2021), the U.S. Supreme Court considered whether Tarahrick Terry, who had been convicted of a crack cocaine offense, was entitled to resentencing under the First Step Act of 2018 (Pub. L. No. 115-391 (2018)). The Court ruled that Mr. Terry was not entitled to resentencing because the provision under which he was convicted did not concern a mandatory minimum penalty and, therefore, he was not eligible for sentence reduction under the First Step Act of 2018.

Facts of the Case

In 2008, Mr. Terry pleaded guilty to one count of possession with intent to distribute crack cocaine. At that time, sentencing was controlled by a federal act that had established mandatory minimum penalties for certain drug offenses, including cocaine (21 U.S.C. § 812 (2006) ('Act')). The Act included two penalties based on the quantity of drugs in the defendant's possession triggered by 5 grams and 50 grams of crack and a third penalty for those found with intent to distribute cocaine that did not depend on quantity.

At Mr. Terry's sentencing, the district court determined Mr. Terry had in his possession about 4 grams of crack cocaine under the Act, and that he was a career offender under the United States Sentencing Commission Guidelines Manual 4B1.1(b) (2008). Because the career-offender Guidelines recommended a higher sentence than the drug-quantity guidelines of the Act, the former controlled and the district court sentenced Mr. Terry to 188 months in prison.

Meanwhile, Congress was actively considering changing the quantity thresholds for crack cocaine penalties. Two years after Mr. Terry's sentencing, Congress passed the Fair Sentencing Act of 2010 (21 U.S.C. § 801 (2010)). Under the Fair Sentencing Act, Congress increased the triggering amount of crack for a five-year mandatory minimum sentence from 5 grams to 28 grams, and the triggering amount for a 10-year mandatory minimum sentence from 50 grams to 280 grams. Additionally, the Congressional Sentencing Commission amended the drug quantity table used to calculate sentencing guidelines, decreasing the recommended sentence for crack offenses. Subsequently, the First Step Act of 2018 made those statutory changes apply retroactively, giving some offenders an opportunity for resentencing.

Mr. Terry first sought resentencing under the new sentencing Guidelines. The district court denied his motion because his 2008 sentencing was based on recidivism and not on the quantity of drugs in his possession. Mr. Terry then sought resentencing under the newly enacted First Step Act of 2018, and the district court again denied his motion on the basis that a sentence reduction is only available for those whose crack offenses triggered a mandatory minimum sentence. The Eleventh Circuit affirmed the district court's decision, and the Supreme Court granted *certiorari*.

Ruling and Reasoning

The U.S. Supreme Court affirmed the decision of the Eleventh Circuit Court of Appeals, ruling that Mr. Terry was not eligible for resentencing under the First Step Act of 2018 because the Fair Sentencing Act only modified statutory penalties for crack cocaine offenses that triggered mandatory minimum sentences.

The Supreme Court said that an offender is eligible for a sentence reduction under the First Step Act only