

Memorial Dedication

It is with sadness that we inform our readers that Paul B. Herbert, MD, JD, died unexpectedly on October 4, 2005. Dr. Herbert was a regular contributor to these pages, applying his interdisciplinary training and experience to his incisive commentaries about developments in case law. His work with the forensic fellows at Tulane University in this issue will unfortunately be his last contribution to the Journal. We dedicate this issue of the Legal Digest to his honor and memory. Dr. Herbert will be missed by his many colleagues and friends.

Competence to Stand Trial

Involuntary Medications Allowed to Restore Competence to Stand Trial

In *United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004), the Second Circuit Court of Appeals grappled with the criteria enunciated in *Sell v. United States*, 539 U.S. 166 (2003), on whether a pre-trial criminal detainee may be medicated against his will to restore competence to stand trial.

Facts of the Case

Aaron Gomes, indicted federally for possession of a firearm by a convicted felon, refused to cooperate with repeated court orders for a psychiatric examination after his attorney raised the issue of his competence to stand trial. Following a 30-day commitment to a federal Bureau of Prisons (Bureau) medical facility for evaluation, the court took testimony from a Bureau psychologist who opined that Gomes was psychotic and lacked a “rational understanding” of the proceedings against him. The court ordered Gomes returned to the medical facility for 90 days, to evaluate his restorability to competence.

Bureau psychiatrists prescribed antipsychotic medication, which Gomes repeatedly refused to take. After a full hearing, the trial court granted the prosecution’s request for an order to medicate Gomes involuntarily. He appealed. The Second Circuit affirmed. Gomes petitioned for *certiorari* to the United States Supreme Court. That Court had just decided *Sell* and remanded for reconsideration in light of the *Sell* criteria: (1) whether the government’s interest in

proceeding to trial on the charge is “important”; (2) whether forced medications will “significantly further” that interest; (3) whether alternative and “less intrusive means” could equally suffice; and (4) whether the medication is “medically appropriate.”

After conducting a *Sell* hearing featuring psychiatric testimony that Gomes (1) suffered from Delusional Disorder (grandiose and persecutory type) and (2) there was a “70 percent chance” he could be restored to competence on antipsychotic medication, based on Bureau statistics, the trial court again ordered involuntary medication. Gomes again appealed, and the Second Circuit again affirmed.

Ruling and Reasoning

The Second Circuit first observed that the Supreme Court in *Sell* had not addressed the burden of proof for the trial court nor the standard of review for the appellate court. The court filled these gaps: (1) the trial court’s findings must be supported by “clear and convincing” evidence; and (2) on appeal, the first criterion, “importance,” is a question of law and therefore amenable to *de novo* review, and the other three criteria are factual, hence reviewable only for “clear error.”

Preliminarily, the court noted that the *Sell* limitations govern the considerations, rather than the more clinical criteria of *Washington v. Harper*, 494 U.S. 210 (1990), only if the sole purpose of medication is to restore competence. That being true in this case, since there was no evidence that in custody Gomes was a danger to himself or others, the court proceeded to apply the *Sell* criteria one by one.

The first *Sell* criterion forced the court into the awkward posture of holding that prosecuting Gomes was important because Gomes was both dangerous and not dangerous. “Congress evidently believed,” the court noted, “when it enacted the statute that possession [of a gun] in the hands of an ‘armed career criminal’ such as Gomes is a serious threat in itself”; therefore “[t]he risk of violence posed [by Gomes] is significant” (pp 160–1). At the same time, “consider[ing] whether the potential for civil commitment abates the Government’s interest in prosecuting Gomes,” as *Sell* directs (539 U.S. at 180), the court was constrained to observe:

[T]he disorders diagnosed in this case relate specifically to the competency determination and not to [the] risk of [Gomes] harming other persons or property; it is therefore relatively unlikely that Gomes would be civilly committed. The prospect of civil commitment is insufficient to undermine the Govern-

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