

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.

Daniel M. Mayman, MD
Chief Resident in Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

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

Burke to the Department of Public Health and Human Services (DPHHS) for treatment of his mental illnesses.

The district court acknowledged Burke's mental health difficulties, but found that his mental condition did not render him unable to appreciate the criminality of his behavior or unable to conform his behavior to the requirements of the law. Therefore, the district court sentenced Burke to the Department of Corrections for the remaining four years of his sentence. Burke appealed to the Supreme Court of Montana, arguing that he should have been sentenced to the DPHHS.

Ruling and Reasoning

The Supreme Court of Montana affirmed the Disposition Order of the district court, finding no abuse of discretion in the sentencing of the defendant to prison, the expert psychological testimony concerning his mental illness notwithstanding. The supreme court cited Mont. Code Ann. § 46-18-203(7)(a)(iii), which sets out the sentencing alternatives and discretionary prerogatives of the trial judge attached to probation revocation. The supreme court found that the sentencing imposed by the trial judge was in conformity with the statute.

A related sentencing statute, Mont. Code Ann. § 46-14-311 (2005), requires that, following a finding of guilty or a plea of guilty made by a defendant, consideration by the trial judge of a defendant's claim of mental disease or defect or developmental disability during sentencing must occur. The statute states:

Whenever a defendant . . . claims that . . . the defendant was suffering from a mental disease or defect or developmental disability that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence that it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination.

Although Burke challenged one finding of fact under this statute, the state supreme court disagreed, concluding that Burke had not demonstrated that the district court "acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason, resulting in substantial injustice." The state supreme court cited the provision of wide latitude in sentencing and held that the trial judge had given adequate consideration of the various rel-

evant sentencing factors. The supreme court noted that the trial judge had taken into account the testimony of the psychologist (Scolatti), Burke's need for mental health care, his prognosis for treatment and his risk to reoffend violently, observations that the Montana State Prison has a mental health treatment program, and various sentencing options other than prison. Furthermore, the state supreme court noted that Scolatti had testified that despite Burke's mental illnesses, Scolatti could not specify what role these illnesses played in his probation violations nor would he testify that to a medical certainty, Burke's mental illnesses caused him to violate the conditions of his probation. As for the capacity to conform to the law, Scolatti, while noting some volitional impairment, testified that the defendant "still has some volitional choice of whether or not to commit a crime." The supreme court took note of the expert's testimony on volitional capacity as further indication that the trial judge had not abused his sentencing discretion in imposing a prison term, despite evidence that the defendant had some mental illnesses.

The supreme court noted that the law in Montana is not settled on the question of whether a defendant may invoke the provisions of Mont. Code Ann. § 46-14-311 (2005), at a revocation hearing, or whether the consideration which must be afforded to evidence of mental illness at sentencing applies only to sentencing at the original trial proceedings and is unavailable to defendants at probation revocation hearings and sentencing dispositions. Since the supreme court could uphold the trial court's sentencing solely on the provision of Mont. Code Ann. § 46-18-203(7)(a)(iii), it noted the trial judge need not have (even though he had) taken into account any mental health evidence that defendant proffered under Mont. Code Ann. § 46-14-311 (2005).

Discussion

This is a case of little precedential weight and few moving parts; no constitutional issues are raised. It involves the application of three state statutes and one hapless defendant and speaks to the considerable latitude in discretion afforded to the trial judge in probation revocation hearings and sentencing procedures. Here, the defendant contested only one judicial finding of fact of the sentencing judge: that the defendant had the volitional capacity to avoid committing acts that violated the terms of his probation.

The standard of appellate review is high: was there an abuse of discretion?

Implicit in the trial judge's findings and the state supreme court's affirmation is a certain discounting of the weight afforded to expert psychological testimony, even when called for by statute, admitted by the judge, and spared rebuttal by the opposing party (in this instance, the state). When defendants in Montana are charged with violation of the conditions of their probation, a Revocation Hearing is held before a judge and the standard of proof is a preponderance of the evidence. Once a violation is found (in the present case, the defendant came to admit to five violations), the trial judge is given great latitude in sentencing, (Mont. Code Ann. § 46-18-203).

Because the defendant raised the issue of his mental illness in the sentencing procedure, the judge allowed expert testimony concerning the defendant's volitional capacity and his treatment needs into evidence (Mont. Code Ann. § 46-14-311). The expert testified that the defendant was mentally ill and volitionally compromised and would best be served by being remanded to the state's mental hospital, an option available to the judge in his sentencing discretion. The trial judge weighed the expert testimony, concluded that the defendant had a modicum of volition in his violation of probation and sentenced him to serve his full probationary term (four years) in state prison, as permitted as a statutory exercise of judicial discretion (Mont. Code Ann. § 46-14-312). A wavering of certainty by the expert on the volitional question was cited by the judge, as were the uncertain benefits of psychological treatment and the potential dangerousness of the defendant.

In 1979, Montana abrogated the insanity defense and replaced it with a statutory procedure that requires a trial judge to make findings of fact concerning a defendant's volitional capacity and ability to appreciate the criminality of his acts. The judge is given discretion in making these findings. The exercise of this discretion is a familiar aspect of judicial decision-making. The statutes call for it, and the standard of review for claimed judicial errors is set high against the defendant.

In a state unimpressed by the insanity defense, it is not a surprising outcome; indeed, it is a near certainty that an appellate court would not find "an abuse of discretion" when a trial judge discounted the substance of a psychological expert's opinions and remanded a probation violator to prison.

Praveen Kambam, MD
Resident Physician

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

Mental Illness and Sentencing Length in Supervised Release Revocation

The Sixth Circuit Affirmed the District Court's Finding that a Defendant's Mental Illness and Need for Treatment Justifies Exceeding the Federal Guidelines for Sentencing Upon Revocation of a Supervised Release

Facts of the Case

In *U.S. v. Mackie*, 173 Fed. Appx. 427 (6th Cir. 2006), defendant-appellant Felton Mackie pled guilty to charges of bank robbery and was placed on 24 months of supervised release following completion of a 46-month sentence. He subsequently committed several violations of the terms of his release, including state convictions for stealing money and trespassing, leaving the Eastern District of Michigan without permission, failing to report to his probation officer for several months, and failing to notify his probation officer of several arrests. The district court imposed a 24-month prison sentence, well in excess of the federal guideline sentence of 5 to 11 months.

The district court record noted that the violations took place in the context of the defendant's not obtaining treatment for his mental illness, as directed by terms of his supervised release. In imposing sentence exceeding the guidelines, the district court stated that \$500 a month was "not enough money to live on. It's not even enough to get the medications. He needs meds and he needs them badly." The court mentioned the defendant's history of homelessness and inability to follow through on recommended care, noting that when on medications the defendant does well. The court said "I don't like to put people in prison for a mental illness, but he has violated and he is a danger to himself as well as society." The court concluded by expressing fear that the defendant may