

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’ re-

sistance 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

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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.

Facts of the Case

Dwight Harrison was charged with first-degree murder for the beating death of Theotrie Archie in July 1998. Mr. Archie's former roommate, Noble Foggs, claimed to have witnessed Mr. Harrison stomping on the victim's throat. Mr. Harrison, who initially denied the murder, confessed to it following subsequent *Miranda* warnings. His confession to the crime came after spending 26 hours in police custody. He also provided a handwritten confession during his police interview. Mr. Harrison pleaded not guilty to the charges and filed a motion to suppress his confession. The court conducted a suppression hearing, took psychiatric testimony related to his mental illness, and then granted the motion to suppress, finding that he had not "intelligently waived" his *Miranda* rights. The state and the appellate court reversed the suppression order, finding that Mr. Harrison's confession was voluntary. The trial court subsequently granted his motion to reopen the suppression motion, but the defense counsel later withdrew that motion and proceeded to a bench trial. Evidence at trial mostly comprised the testimony previously offered by witnesses at the suppression hearing, including police witnesses, Mr. Harrison's sister, and a prosecuting attorney who had taken a jailhouse statement from Mr. Harrison. Also included were the testimony of Mr. Foggs and Mr. Harrison's confession.

Based on evaluations by two forensic psychiatrists, the defense argued that Mr. Harrison was, at the time of the murder, suffering from schizophrenia and hence was unable to appreciate the criminality of his conduct or to conform his behavior to the requirements of law. A third forensic expert testified that while Mr. Harrison was mentally ill, no expert was in a position to offer an informed opinion as to his state of mind at the time of the crime.

The trial court found that the state had proved the first-degree murder charge, but that the defense had also established that Mr. Harrison was criminally insane at the time of the murder. Upon the NGRI finding, and pursuant to state law (730 Ill. Comp. Stat. Ann. 5/6 2-4 (a) (West 2002)), Mr. Harrison's mental health was evaluated, and after a hearing he was committed to inpatient treatment at the Department of Human Services for up to 28 years.

Mr. Harrison appealed, disputing the court's predicate finding and the sufficiency of the evidence that he had murdered Mr. Archie. He further argued

ineffective assistance of counsel based on his attorney's failure to make another motion for suppression of his confession following the judicial finding that he was insane at the time of the murder. The court of appeals denied the appeal, holding that it lacked jurisdiction to review the appeal because all issues were rendered moot by the NGRI finding. It held that "an NGRI verdict is, in all form and substance, an acquittal," and as such, could not be appealed (*People v. Harrison*, 366 Ill. App. 3d 210, 214 (Ill. App. Ct. 2006)). Mr. Harrison appealed the appellate court's finding and the Supreme Court of Illinois heard the case.

Ruling and Reasoning

Mr. Harrison argued that an NGRI ruling is not a complete acquittal. Unlike a non-NGRI acquittal, where there is an insufficiency of evidence in the state's case, to reach an NGRI verdict, the state must first prove all the elements of the charged crime beyond a reasonable doubt. Thus, Mr. Harrison argued that an NGRI is actually a finding of guilty but insane, a verdict that allows a convicted defendant the right of appeal. In support, he cited *People v. Wells*, 690 N.E.2d 645 (Ill. App. Ct. 1998). The *Wells* court observed that a defendant found NGRI is not acquitted of the crime charged because of the need for a predicate guilty finding before an NGRI finding can be pronounced.

Mr. Harrison also cited an Illinois Court of Appeals case that was decided subsequent to his own and allowed appellate review of an NGRI finding. In *People v. Trotter*, 864 N.E.2d 281 (Ill. App. Ct. 2007), the defendant appealed her NGRI verdict in a case in which she was charged with aggravated kidnapping. Following a jury trial she was found NGRI, and she appealed her conviction, challenging the sufficiency of the state's evidence. The court of appeals held that the post-NGRI designation remanding her for mental health commitment was a sufficient intrusion on her liberty interests to belie the claim that an NGRI finding was a legally complete acquittal. The court of appeals rejected the state's argument that her claim was made moot by her legal innocence. The court then reviewed the state's evidence of the crime of aggravated kidnapping and concluded that she was wrongly convicted; the court then reversed the NGRI designation and her conviction on the underlying crime of aggravated kidnapping.

Mr. Harrison claimed that he was still legally aggrieved because the NGRI ruling, just as in *Trotter*, resulted in his involuntary commitment to an inpatient mental health facility. He argued that this represented an infringement on a substantial liberty interest. He also claimed that the question of his guilt was not rendered moot by the NGRI finding. As a nonmurderer, his danger to himself and others might be assessed differently, and his care might be provided with fewer restrictions. The defendant also cited cases similar to his own in Texas, Connecticut, and Louisiana, where findings of NGRI were allowed appellate review.

The Supreme Court of Illinois found the *dicta* and holding of the *Wells* court to be unpersuasive. It noted that the opinion in *Wells* was unsupported by citation to authority; the cited portion of the case was merely *dictum*, and not a necessary part of the court's decision. The court also dismissed the reasoning of the *Trotter* court and overruled the *Trotter* decision as inconsistent with their opinion.

Instead, the supreme court held that an NGRI acquittal is an acquittal as set by the Code of Criminal Procedure (Code). The Code states that "when the affirmative defense of insanity has been presented during the trial and acquittal is based solely upon the defense of insanity, the court shall enter a finding of not guilty by reason of insanity" (725 Ill. Comp. Stat. Ann. 5/115-3(b)(West 2002)). The court went on to clarify the differences between a finding of NGRI and a finding of guilty but mentally ill (GBMI) as laid down in statute and supported by case law. The supreme court held that an NGRI finding is not a finding of guilty but insane.

The Illinois Supreme Court cited Article VI, section 6 of the Illinois Constitution, which states "there shall be no appeal from a judgment of acquittal" (Ill. Const. 1970, art. VI, § 6). The supreme court argued that since an NGRI finding is an acquittal, the appellate court was correct in denying the defendant's appeal. The supreme court distinguished the Texas, Louisiana, and Connecticut cases cited by Mr. Harrison, noting that in those jurisdictions where NGRI findings are permitted appellate review, there is no express constitutional prohibition of appeal from an acquittal.

The supreme court agreed with the appellate court in holding that Mr. Harrison was not aggrieved by the NGRI ruling, the effect of which was to absolve him of guilt. It noted that, rather, Mr. Harrison's

grievance, if any, lay with the court's post-trial finding that he was in need of inpatient mental health care, and that this finding was still open to challenge, if the defendant so chose. It also noted that the mental health determinations were civil proceedings and not punishment in the criminal sense, so there could be no aggrieved claim founded on a criminal punishment theory.

Discussion

As the Supreme Court of Illinois acknowledged, "it is well settled that detention of an individual at a mental health care facility implicates a substantial liberty interest" (*Radzewski v. Cawley*, 639 N.E. 2d 141, 143 (Ill. 1994)). The restrictions placed on defendants receiving treatment on an inpatient basis are not insignificant. Such patients are not allowed outside the facility's housing unit without the presence of personnel of the Department of Human Services and must be secured if transported off the facility. Individuals who are judged to require only outpatient mental health services, however, may be conditionally released.

Clearly, there is a substantial gap between the treatment of defendant-acquittes found in need of inpatient care and those found requiring only outpatient mental health services. In deciding whether a defendant-acquittee requires inpatient or outpatient care, the court considers whether the defendant poses a physical danger to himself or others. The defendant's dangerousness in turn is determined partially by "whether the defendant appreciates the harm caused by the defendant to others and the community by his or her prior conduct that resulted in the finding of not guilty by reason of insanity" (730 Ill. Comp. Stat. Ann. 5/5-2-4(g)(1)(West 2006)). In other words, whether or not the defendant who is found NGRI is committed to inpatient care is determined partially by the act the trial court found him or her to have committed.

The crux of the supreme court's decision to affirm the judgment of the appellate court lay in the language of the Code and the Illinois Constitution. A finding of NGRI is an acquittal, as set by the Code (725 Ill. Comp. Stat. Ann. 5/115-3(b)(West 2002)) and the Illinois Constitution, which clearly states that "there shall be no appeal from a judgment of acquittal" (Ill. Const. 1970, art. VI, § 6). The majority opinion held that if the framers of the Constitution thought that a ruling of NGRI should be ex-

cluded from the barring of appeal of acquittals, they could have done so.

The Illinois Constitution's barring of appellate review of acquittals, similar to the Double Jeopardy Clause in the Federal Constitution's Fifth Amendment, is intended to protect the individual from the state. In the majority of cases of an acquittal, there is no need for a defendant to appeal the judgment, because there is simply nothing to appeal. Yet, an NGRI verdict precludes the acquittee from later challenging the finding of his actually having committed the underlying crime, or reviewing the adequacy of the state's proof. Even if new evidence of actual innocence emerges, or proof of prosecutorial misconduct, the individual cannot clear his record. He is left with the more burdensome civil commitment conditions that accompany an NGRI-based commitment, though he may be factually innocent of the crime he is said to have committed. Yet, in the case of an NGRI finding, the predicate finding of guilty can be the deciding factor that commits the defendant to many years of restrictive, inpatient treatment. Since an NGRI ruling is not subject to appellate review and since there is no other way of challenging the issue of guilt, the result is a law that theoretically protects the defendant, but in this instance produces the converse effect. As Justice Burke said in his special concurring opinion:

Because of the serious consequences that follow a finding that an NGRI defendant is in need of mental-health services on an inpatient basis, I urge our legislature to craft a remedy that affords these defendants an opportunity to contest the finding that they committed the act charged [*Harrison*, p 441].

Psychiatric Diagnosis Delays Parole

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State Prisoner Who Is Otherwise Eligible for Parole May Have His Parole Postponed if He Presently Suffers From a Severe Mental Disturbance That Constitutes a Public Danger

In *Hess v. Board of Parole and Post-Prison Supervision*, 514 F.3d 909 (9th Cir. 2008), the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the district court that the Board had the right to postpone Willie Hess' parole release date. The postponement was partially based on the finding that Mr. Hess had psychiatric diagnoses constituting a present, severe emotional disturbance that represented a danger to the community. Mr. Hess had a diagnosis of pedophilia and personality disorder with antisocial and narcissistic features, and in this case the threat was one of recidivism (i.e., future sexual assaults on children). The appeals court determined that contrary to Mr. Hess' claim, the postponement ruling that guided the Board's decision was not unconstitutionally vague in specifying the criteria for psychiatric diagnoses that may support the decision to postpone parole. The decision highlights the obstacles facing the offender with diagnosed psychiatric illness that is considered to endure over time and is associated with a high probability of recidivism when the offender seeks release from the correctional institution.

Facts of the Case

Willie Hess had been incarcerated in Oregon since 1984 for multiple convictions of rape, sodomy, and child sexual abuse. Before his 2003 parole hearing, he underwent psychological evaluation by a licensed psychologist. The examiner submitted a report to the court indicating his opinion that Mr. Hess did not display any "behavioral signs for the presence of significant mental or emotional disturbance" at the time of the evaluation. However, in the same report he also provided a diagnosis of pedophilia and personality disorder with narcissistic and antisocial features, according to the criteria of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Furthermore, he characterized Mr. Hess' diagnoses as "severe ones predisposing him to the commission of crimes to a degree rendering him an ongoing threat to the health and safety of the community" (*Hess*, p 912). He added that based on the nature and pattern of Mr. Hess' offenses and his refusal to participate in treatment