preme Court, echoing the common law principle, held that, "Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care" (p 573).

Relying on *Nelson*, the court concluded that the Utah statute did not require the therapist to protect Officer Robinson; however, when the therapist undertook the affirmative act of responding to the dispatcher's question, the therapist had a common law duty to do so non-negligently.

Involuntary Medication to Restore Competence to Stand Trial: *Sell* Applied

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New Mexico Supreme Court Clarifies the Second *Sell* Criterion as a "Mixed Question of Law and Fact" and That the State's Evidentiary Burden in *Sell* Cases Must Meet the Clear and Convincing Standard

In *State of New Mexico v. Dawna Cantrell*, 179 P.3d 1214 (N.M. 2008), the Supreme Court of New Mexico heard an appeal from the Sixth Judicial District Court as to whether ordering involuntary antipsychotic treatment for the sole purpose of restoring competency to stand trial violates an individual's due process rights. The court applied the criteria from *Sell v. United States*, 539 U.S. 166 (2003), and affirmed the trial court's order for involuntary medication.

Facts of the Case

On October 1, 2003, Dawna Cantrell was arrested and charged with the murder of her husband and two counts of tampering with evidence. Ms. Cantrell's competency was questioned after evaluation by the defense expert, Dr. Eric Westfried. After subsequent evaluation by the state's expert, Dr. Edward Siegel, both experts found that Ms. Cantrell had a "persecutory delusional disorder" and that her mental illness precluded her from assisting her attorney in her defense. The trial court found her incompetent to stand trial and ordered a dangerousness evaluation. Dr. Siegel conducted another evaluation, after Ms. Cantrell had been treated with antidepressant medication, and opined that she was not dangerous and could probably assist her attorney during trial if she were also treated with antipsychotic medication.

In response to Dr. Siegel's report, the court ordered a re-evaluation of competency to be performed by a new forensic evaluator, Dr. Gerald Fredman. He concurred with the previous competency evaluations that Ms. Cantrell was unable to assist her attorney and therefore not competent, but would become competent if treated with antipsychotic medications. The state filed a motion asking for the court to order Ms. Cantrell to submit to a psychiatric examination for the purpose of prescribing antipsychotic medication and restoring her competency. At the hearing on that motion, the court heard contrary testimony from two experts, Dr. Fredman, characterized by the court as an experienced clinical and forensic psychiatrist, and Dr. Westfried, characterized as an experienced research and forensic psychologist.

Dr. Fredman relied on clinical experience and testified that it was "more likely" than not that antipsychotic medication would restore Ms. Cantrell's competency to stand trial and that disabling side effects from said medication would not occur. Dr. Westfried relied on the lack of literature support for antipsychotic medication in treating delusional disorder and testified that, in his opinion, antipsychotic drugs would not help, because they "diminish the frequency and severity of the looseness of associations," a symptom he did not believe Ms. Cantrell displayed.

The trial court applied the due process guidelines from *Sell* and found clear and convincing evidence that the state had met the burden for each leg of the *Sell* test. Ms. Cantrell was ordered to submit to a medication evaluation and take said medication, if medically appropriate. The trial court certified the decision for an interlocutory appeal, sending the matter to the New Mexico Supreme Court.

Ruling and Reasoning

Relying primarily on *Washington v. Harper*, 494 U.S. 210 (1990), and *Sell*, the court ruled that the trial court appropriately determined that there was no question of dangerousness that would allow in-

voluntary medication on "*Harper*-type grounds." In this case, when involuntary administration of medications would be solely for restoration of competence, the *Sell* standard was appropriate.

The court then clarified the standards of review for each of the four legs of the *Sell* test, acknowledging that legal conclusions are reviewed *de novo* and factual findings are reviewed only for sufficiency of evidence. The first *Sell* factor is a legal consideration that important governmental interests must be at stake to warrant consideration of involuntary medication.

The second *Sell* factor directs, "the court must conclude that involuntary medication will significantly further concomitant state interests" and be "substantially likely" to restore competency and "substantially unlikely" to cause side effects that would prevent the defendant from assisting counsel (*Sell*, pp 180–1). Here, the court acknowledged that the Second and Fourth Federal Circuit Courts of Appeals have interpreted this factor as a factual issue (in *United States v. Gomes*, 387 F.3d 157 (2d. Cir. 2004) and *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005)), while the Tenth Circuit interpreted it as a legal issue (in *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005) and *United States v. Valenzuela-Puentes*, 479 F.3d 1220 (10th Cir. 2007)). The court clarified that the second *Sell* factor is therefore a mixed question of law and fact. This interpretation requires the appellate court to review the trial court's factual finding for sufficiency of evidence and then to determine, *de novo*, whether the facts meet the legal standards.

The third *Sell* factor requires the court to find that involuntary medications are necessary to further the state's interest, and the fourth factor requires that proposed treatment be in the defendant's best medical interest. Both these factors are questions of fact, the court explained, and are best determined by the trial court. The court also supported precedent that *Sell* factors must be satisfied by clear and convincing evidence.

In light of these clarifications, the court found that the first and third factors were not in dispute. On the second *Sell* factor, the court found that Dr. Fredman's testimony that adding antipsychotic medication to Ms. Cantrell's treatment would "more likely than not" render her competent did satisfy the state's burden, as the trial court had found this testimony factual. On the fourth factor, the court also ruled that there was significant evidence, based on Dr. Fredman's testimony, that the antipsychotic treatment was medically appropriate. The trial court's order was therefore affirmed.

Discussion

An individual's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment" was established in *Washington v. Harper*, 494 U.S. at 221–2. The Due Process Clause prohibits deprivation of that liberty interest unless certain conditions are met. While *Harper* sets out minimum due process requirements for dangerousness to be an avenue through which the government can medicate an individual over his or her objection, there are certain other compelling state interests in which involuntary antipsychotic medication may be warranted.

In *Sell v. United States*, the United States Supreme Court delineated due process requirements for the instances in which involuntary medication was necessary to render an otherwise nondangerous defendant competent to stand trial. Justice Breyer's opinion in *Sell* left little doubt that the Court hoped these instances would be "rare" (*Sell*, p 180) and could be avoided if "forced medication is warranted for a different purpose" (*Sell*, p 182). As such, the Court was cautious in providing much guidance in applying what have become known as the *Sell* criteria.

New Mexico v. Cantrell is noteworthy for the New Mexico Supreme Court's having settled an inconsistency in prior *Sell* cases as to how appeals of the second *Sell* criterion should be reviewed (although it remains to be seen if other courts, particularly Federal courts, will agree with their solution). Here, the court concluded that the second *Sell* criterion is a "mixed question of law and fact," that is:

> . . . [Q]uestions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated [*Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982)].

Essentially, if the second *Sell* criterion is a "mixed question of law and fact," then the appellate court will determine if the trial court erred in determining that the expert testimony was factual and then determine if that factual testimony meets the evidentiary burden that the involuntary medication is "substantially likely" to make the defendant competent to

stand trial and "substantially unlikely" to have side effects that would hinder the defendant in assisting counsel.

What is left unclear for forensic psychiatrists, despite the court's agreeing with precedent that the evidentiary standard in all factors of *Sell* cases is clear and convincing evidence and the interpretation of the second criterion as above, is what "substantially likely" or "substantially unlikely" mean on a psychiatric level. The court did acknowledge that setting a number or percentage level of confidence to "substantial" risks inviting experts to tailor their testimonies to the desired result. The court seemed satisfied with the trial court's interpretation that, "whether the percentages are twenty percent or thirty percent or ten percent, is not for me to decide, there's just whether there's substantial unlikely [*sic*] to have side affects [*sic*]: (*Cantrell*, p 1222). It remains to be seen whether courts outside of New Mexico will also be satisfied with these interpretations of *Sell*.

Expansion of Liberty Interests Under Parole Conditions: Beyond Antipsychotics

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Courts Must Justify Special Conditions of Release That Impact Liberty Interests

The United States Court of Appeals for the Ninth Circuit decided the case of *United States v. Cope*, 506 F.3d 908 (9th Cir. 2007), on November 5, 2007. At issue were the imposition of a lifetime of supervised release and the special conditions of release. Mr. Cope argued that it was unreasonable for the District Court to sentence him to a lifetime of supervised release. He also challenged certain special conditions of his supervised release on the grounds that he did not receive notice of the conditions before the district court's announcement of the sentence, and that the district court failed to make adequate findings to support the special conditions of release. The specific conditions of release that were contested were the requirements to take "all medications" and submit to plethysmography testing.

Facts of the Case

In September of 2003, San Bernardino Sheriff's Department deputies discovered over 600 images and 20 videos of child pornography on Mr. Cope's home computers, including "videos of sadistic and masochistic acts." On March 10, 2006, he pleaded guilty to one count of possession of child pornography. He entered his plea pursuant to a plea agreement with the government in which both parties stipulated to a total offense level of 28 under the United States Sentencing Guidelines, including numerous upward adjustments relating to the possession of child pornography. The government conditionally agreed to seek the low end of the guidelines range for incarceration, but made no agreement as to what term of supervised release it would seek. In return, Mr. Cope agreed to waive his statutory right to appeal "any sentence imposed by" the district court, provided certain requirements were met. He retained his right to appeal most of the special conditions of his supervised release.

Following the change of plea hearing, the probation office prepared a pre-sentence report (PSR), using the November 2002 Sentencing Guidelines, recommending a total offense level of 25 and a criminal history category of II. According to the Guidelines, Mr. Cope's prior conviction of attempted sexual assault on a child required a mandatory minimum sentence of 120 months for the current offense. Not included in the PSR report was the fact that the Guidelines also contain a policy statement recommending the statutory maximum term of supervised release for those convicted of sex offenses. The statute in effect at the time provided for a lifetime maximum term of supervised release. In response to the PSR, the government filed a sentencing memorandum recommending that Mr. Cope receive the maximum, lifetime term of supervised release. He filed a memorandum requesting a term of supervised release of less than life, specifically objecting to any special condition of supervised release of which he had not been given notice.

The district court held a sentencing hearing on July 10, 2006. After hearing from the parties, the district court sentenced Mr. Cope (58 years old at the time of sentencing) to 120 months in prison, the