Treating Incompetent Defendants: The Supreme Court's Decision Is a Tough *Sell*

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What do you do with a delusional dentist? That's the dilemma that federal correctional officials faced with Dr. Charles Sell, a dentist from St. Louis who was charged with Medicaid fraud, mail fraud, and money laundering for allegedly submitting false insurance claims. Found incompetent to stand trial in 1999, Sell was confined in a federal prison hospital, where he refused to take antipsychotic medication that might restore his capacity. The question raised by his case—the circumstances under which defendants can be compelled to take medication to render them competent to stand trial—ultimately reached the U.S. Supreme Court, which recently issued its judgment on the matter (1).

Sell has a long history of mental illness, his first hospitalization coming more than 20 years ago, when he claimed that the gold he used for fillings had been contaminated by communists. Treatment with the antipsychotic drug haloperidol led to his rapid discharge, but he soon stopped taking the medication. Two years later, Sell's call to police asking them to shoot a leopard that he claimed was outside his office preparing to board a bus precipitated his second admission. During the intervening years, Sell repeatedly complained that various public officials were out to kill him, and not long before his arrest in 1997 he offered police officers the disconcerting news, "God told me every [FBI] person I kill, a soul will be saved."

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Although Sell was originally released on bail after his arrest, a revocation hearing was held in 1998 after the government charged that he had tried to intimidate a witness, one of his former employees. At the hearing, Sell was described as "totally out of control," screaming racial epithets at the judge and spitting in the judge's face. He was subsequently indicted for attempted murder of the FBI agent who arrested him and of his former employee. Sell's attorneys asked for an evaluation of his competence to stand trial, and after he was found incompetent, Sell was sent to the U.S. Medical Center for Federal Prisoners in Springfield, Missouri. It was that facility's request to treat him over his objections that precipitated the subsequent legal battle.

In keeping with Bureau of Prisons procedures (2), the request to treat Sell involuntarily was reviewed at an administrative hearing by a psychiatrist not otherwise involved in his care. The psychiatrist authorized treatment on the grounds that Sell was mentally ill and dangerous and also that medication was necessary to restore his competence to stand trial. After this finding was upheld by an internal review at the medical center and by a federal magistrate (3), Sell challenged it in federal district court. He argued that the side effects of the medication had been underestimated, that he was not dangerous, and that before treatment could take place, the effect of medication on his ability to receive a fair trial had to be taken into account. Although the district court judge disagreed with the magistrate's finding concerning Sell's dangerousness in a prison setting—despite Sell's continuing delusions of persecution and an erotomanic attachment to a prison nurse—he affirmed the order for treatment on the basis that it was necessary if Sell were to be rendered competent to stand trial, and he rejected the remainder of Sell's objections (4). A panel of the U.S. Court of Appeals for the 8th Circuit voted 2-1 to uphold the district court's opinion (5).

Although the law governing this issue in federal facilities had never been clearly established, the courts that considered Sell's objections to treatment were not writing on an entirely clean slate. An earlier decision of the U.S. Supreme Court, *Washington v. Harper,* while recognizing that persons have a liberty interest in being free from involuntary medication, nonetheless acknowledged the state's right to treat dangerous prison inmates with antipsychotic medication against their will (6). Thus, if the courts had upheld the finding that Sell was a danger to others in prison, the matter might have ended there.

A second Supreme Court decision a few years later, *Riggins v. Nevada,* dealt with a situation a little more like Sell's, in which a prisoner who had been medicated involuntarily before trial and who was later found guilty and condemned to death asked to have his conviction overturned on the grounds that treatment had been administered illegitimately (7). Although the decision that overturned the prisoner's conviction avoided a direct holding on the question of when treatment could be ordered, the justices did suggest that "the state might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means."

For a decade after the decision in *Riggins,* the lower courts had been

reading the tea leaves in the Supreme Court's opinions and attempting to craft rules governing when incompetent defendants could be treated. The federal circuit courts that had ruled on the issue all agreed that *Harper* and *Riggins* implied that the government could medicate even nondangerous defendants under certain circumstances, but they split on how limited those circumstances were—for example, whether the government had to prove a "compelling state interest," perhaps based on the severity of the crime—and whether courts had to decide in advance whether the side effects of treatment might impair prisoners' abilities to defend themselves at trial. The most permissive of the standards would have given the government considerable leeway in deciding to treat, whereas the most restrictive would have all but eliminated the possibility (8).

So the Supreme Court's opinion in *Sell* was awaited with no small interest in criminal justice, correctional, and psychiatric circles. Although aspects of the opinion are predictable and reasonable, the justices' unfamiliarity with the realities of severe mental illness led to some less salutary results. Writing for a six-justice majority, Justice Breyer laid the groundwork for what would follow by drawing the logical implication from the Court's previous cases: "[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial." However, Breyer hedged the permission to treat with several significant qualifications that led him to conclude that the circumstances in which it would be granted were likely to be "rare."

First, Breyer required a judicial finding that "important governmental interests are at stake" in bringing a defendant to trial. To meet this standard, the crime of which the defendant is accused must be a serious one, although the opinion provides no assistance in determining where the implied line should be drawn. Moreover, Breyer suggested that the likelihood that a defendant who refused treatment would be held for a substantial period in a psychiatric facility would diminish the interest that the government could demonstrate in proceeding to trial. The government's interest in not detaining indefinitely a psychotic prisoner who cannot be treated, however, and the effect such prisoners can have on the correctional milieu went unmentioned.

Second, the opinion required a reviewing court to conclude that involuntary medication would significantly further the state's interests in trying the defendant. This means "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel . . . thereby rendering the trial unfair."

As a third consideration, the medication to be administered must be necessary to bring the defendant to trial. That means that nonmedical treatments, per a suggestion in the brief of the American Psychological Association, must be shown to be unlikely to be effective (9). (Read fairly, however, the studies cited in the brief do not indicate that the psychoeducational interventions referred to can substitute for pharmacologic treatment of psychotic symptoms, only that they may have some adjunctive benefit for defendants whose symptoms are otherwise being brought under control with medication.) In addition, and rather astonishingly, Breyer indicated that "the court must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods." For a justice of the U.S. Supreme Court to suggest that a psychotic, treatment-refusing defendant, found incompetent to stand trial and already confined in a prison medical facility would agree to take medication because a judge threatened to hold him in contempt bespeaks a remarkably optimistic view of judicial power—and a serious lack of appreciation of the nature of psychosis.

Fourth, as everyone would agree, the reviewing court must find that the treatment plan is in the defendant's best medical interests. Finally, Justice Breyer pointed to "strong reasons" for a court to consider first whether administration of medication could be justified on the alternative grounds of dangerousness. In his view, an inquiry into whether a prisoner is dangerous is likely to be more "objective and manageable than the inquiry into whether medication is permissible to render a defendant competent." Even granting the Court's unfamiliarity with several generations of research that demonstrate the frustration of trying to predict who will be violent, the record of this case itself should have suggested that such prognostication is no simple matter. Sell was believed dangerous by his treaters, a finding upheld by administrative review and by the federal magistrate. But the district court overturned that ruling, and the Court of Appeals agreed. Breyer himself, in the venue most distant from the clinical setting and least familiar with it, appeared to conclude that the dangerousness of Sell's erotomanic longings was underestimated by the lower courts. Given this record, it should have been obvious to the Court that determining dangerousness is typically neither "objective" nor particularly "manageable."

Where does *Sell* leave the matter of involuntarily treating incompetent defendants? To begin with, it is clear that judicial hearings, not merely prison administrative proceedings, will be required for treatment to proceed. Further litigation will be required to establish which charges are "serious" enough to even warrant consideration at these hearings. But the courts will have difficulty with several of the findings that Breyer's opinion mandates. Although medications are usually effective for the control of psychotic symptoms, it will not always be easy to establish in advance that a treatment regimen is "substantially likely" to restore competence. Moreover, given that side effects vary greatly from person to person, prospectively determining that it is "substantially unlikely" that side effects will interfere with the ability to assist counsel is a difficult task. It

Continues on page 1341

Continued from page 1336

would be more sensible, as one court of appeals suggested, to make this determination after treatment has succeeded in restoring competence (10).

The other required criteria are not likely to present major obstacles to a finding that treatment should take place. Medical appropriateness, the absence of nonmedical therapies, and the likely ineffectiveness of threats to hold psychotic prisoners in contempt should be straightforward in almost all cases. But the strong suggestion in the opinion that hearings be held first on the issue of dangerousness, if read by the lower courts as a firm requirement, will lead to additional and often needless litigation. It is worth underscoring that although the Supreme Court's opinions are binding in federal courts, and although an opinion such as *Sell* that rests on constitutional grounds sets a mandatory floor for the states, state courts and legislatures, if they so choose, can create more restrictive rules governing involuntary medication of defendants.

As for Dr. Sell, his case has been remanded for reconsideration in light of the new standards proclaimed by the Supreme Court. Six years after his arrest and more than four years after he was first found incompetent to stand trial, he remains imprisoned, psychotic, and untreated. ♦

References

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