

“THE FEDERAL CORNER”

A Case of First Impression on Forcibly Medicating a Defendant Against Her Will

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In a case of first impression in the Circuit, a panel of the United States Court of Appeals for the Fifth Circuit held that – *in order to forcibly medicate a criminal defendant against her will* – the government bears the burden of satisfying the four-pronged *Sell* test, 123 S.Ct. 2174, *providing clear and convincing evidence* under each of these four prongs. *United States v. James*, ___F.3d___, 2019 WL 4410005 (5th Cir. Sept. 16, 2019) [Panel: Circuit Judges Holly, Ho and Engelhardt. (Opinion by Judge Ho)]

[Compelling the Medication of a Defendant]

Forced medication to ensure that a mentally troubled criminal defendant is competent to stand trial implicates profound liberty interests under the Due Process Clause. To protect those interests, the Supreme Court has established a four-prong test that prosecutors must satisfy before a court may compel the medication of the accused. *See Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003).

To date, however, neither the Supreme Court nor this court have stated what burden of proof the government must carry under the four-prong test. But our sister circuits overwhelmingly agree that the government must establish the four factors by clear and convincing evidence, and not just by a preponderance of the evidence. The parties here agree as well. We now join our sister circuits and adopt the same burden of proof today.

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[A Bureau of Prisons Psychologist
Concluded that James was Competent to Stand Trial]

Susan James allegedly threatened to kill her aunt and uncle in violation of 18 U.S.C. § 875(c). After she was arrested and taken into custody, the district court held a hearing to determine whether James was competent to stand trial, in light of her stated belief that everyone involved in this prosecution, including her own lawyer, was conspiring against her. Prior to the February 7, 2018, hearing, James underwent a court-ordered psychiatric and psychological evaluation conducted by Dr. Tennille Warren-Phillips, a licensed psychologist, at the Bureau of Prisons (BOP) federal detention center in Houston, Texas. Dr. Warren-Phillips diagnosed James with General Personality Disorder and Obsessive-Compulsive Disorder, but nevertheless initially concluded that she was competent to stand trial.

[An Independent Forensic Psychiatrist
Concluded That James Was Not Competent to Stand Trial]

James's attorney, however, was concerned about her own fraught interactions with James. So she requested an independent evaluation.

The independent evaluation conducted by Dr. Loretta Sonnier, a forensic psychiatrist, concluded that James was *not* competent to stand trial. As reflected in her December 21, 2017 report, Dr. Sonnier diagnosed James with 'schizoaffective disorder, bipolar type'—a condition marked by 'fixed false beliefs' that 'affect her judgment.' Dr. Sonnier further concluded that psychotropic medication would be 'substantially likely' to render James competent to stand trial.

[After a Hearing, Judge Ashe Found That James Was Not
Competent to Stand Trial and Sent Her to a Medical Facility]

After a hearing held on February 7, 2018, the district court found James was not competent to stand trial.

James was then sent to a medical facility in an effort to restore her competency. Dr. Hayley Blackwood, a forensic psychologist, informed the court of her conclusion that James suffered from Delusional Disorder, Persecutory Type, and would need to be medicated to stand trial. In a preliminary letter submitted to the court, Dr. Blackwood said: '[W]e believe there is an increased likelihood that with [psychotropic medication], [James] could be restored to competency to stand trial in the foreseeable future.' She repeated this conclusion in her full report to the court.

[Bureau of Prisons Doctors Concluded That Involuntary Treatment
With Antipsychotic Medication Would Be Medically Appropriate to
Restore James to Mental Competency]

The BOP held an administrative hearing and reaffirmed Dr. Blackwood's conclusions. Dr. Judith Cherry, who oversaw the hearing, concluded that '[a]ntipsychotic medication is [] recognized as a safe and standard treatment for Delusional Disorder. The evidence presented is clear, and persuasive that involuntary treatment with antipsychotic medication is medically appropriate and the only viable option to restore Ms. James to mental competence to stand trial.'

[James Refused to Consent to be Medicated
and the Government Requested a *Sell* Hearing]

James consistently refused consent to be medicated. So the government requested a hearing under *Sell* to determine whether it could medicate her involuntarily. *See* 539 U.S. at 179–81, 123 S.Ct. 2174.

At the January 10, 2019 hearing, both Dr. Blackwood and Dr. Jose Silvas, a

psychiatrist in charge of James's medication, testified that medication was necessary to restore James's competency. James's counsel cross-examined the government's witnesses, and James spoke on her own behalf, but otherwise did not provide her own evidence.

[Judge Ashe Concluded That the Government Had Met Its Burden
and Ordered That James Be Involuntarily Medicated Unless She Would
Agree to Voluntarily Receive Antipsychotic Medication]

In an oral pronouncement, the district court concluded that the government met its burden under *Sell*, and ordered that James

shall be involuntarily medicated, in an attempt to render her competent to stand trial, in accordance with the treatment plan recommended by Dr. Silvas Prior to each administration of involuntary medication, James shall be provided an opportunity to voluntarily receive antipsychotic medication, as directed by Dr. Silvas, as an alternative to involuntary medication. ... James shall remain confined at the Carswell Federal Medical Center (FMC) for six (6) months, or a lesser period that is reasonably sufficient to restore her to competency.

[Judge Ashe Entered a Written Order in Order
That James Could Pursue an Interlocutory Appeal]

The court memorialized its oral ruling in a non-substantive written order, which it stayed so James could seek an interlocutory appeal. *See Sell*, 539 U.S. at 176–77, 123 S.Ct. 2174 (permitting interlocutory appeal of such orders under the collateral-order doctrine). To date, James has been in custody for over two years.

[The Due Process Clause of the Fifth Amendment
and Forcibly Medicating a Criminal Defendant]

The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.' U.S. CONST. amend. V. Forcibly medicating a criminal defendant to ensure that he is competent to stand trial plainly intrudes upon liberty interests protected by the Due Process Clause. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 725, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (noting our 'long legal tradition protecting the decision to refuse unwanted medical treatment'); *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) ('At common law, even the touching of one person by another without consent and without legal justification was a battery. ... This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.').

[The *Sell* Test]

In *Sell*, the Supreme Court set forth a four-prong test to govern the forcible medication of defendants to restore their competency for trial. *District courts must ask* ‘(1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate.’ *United States v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007) (citing *Sell*, 539 U.S. at 179, 123 S.Ct. 2174). (emphasis added)

[*Sell* Does Not Establish the Government’s Evidentiary Burden]

Sell did not, however, establish the government’s evidentiary burden. But on appeal, the parties agree that the government must provide clear and convincing evidence under the four-prong test before an accused may be forcibly medicated. Nine of our sister circuits take the same view today—as did the United States government in *Sell* itself.

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[The Record Does Not Reflect What
Evidentiary Standard Judge Ashe Applied]

It is not clear whether the district court here applied a clear and convincing evidentiary standard—which is perhaps understandable, because until today, our court has not adopted a standard. From our review of the record, the district court only invoked the need for ‘clear and convincing evidence’ when it analyzed the second *Sell* factor. The court was silent as to the burden of proof governing the other *Sell* factors—as the government recently acknowledged in a post-oral-argument filing on appeal.

[The Court Remands the Case Back to Judge Ashe]

Because we cannot determine what standard the district court applied, we vacate the *Sell* order and remand to allow the district court to apply the clear and convincing standard in the first instance. *See, e.g., United States v. Bush*, 585 F.3d 806, 817 (4th Cir. 2009) (‘[T]he application of the clear-and-convincing standard in this case might be material to the question of whether the government met its burden. For that reason, we remand this issue ... to the district court to receive further evidence, if it deems it appropriate, and to apply the clear-and-convincing burden of proof.’).

Forced medication would be a significant incursion into James’s liberty. We cannot tell whether the district court here applied the proper burden of proof—and thus we cannot tell whether the evidence is sufficient to support such an incursion. Accordingly, we vacate the *Sell* order and remand for further proceedings.

My Thoughts

- In 2004, I represented a client who had killed two of her children and seriously injured a third. Eventually, she was prosecuted and found not guilty by reason of insanity. The first time that I talked to her, she told me that she was expecting me because she had seen a large, male deer in the pasture while she was waiting for the ambulance and the officers to come to her home. It was a buck. She also knew that my legal assistant, Debbie, was going to be with me because – on her cell walls – were the letters *D, E and B*. It was very painful to listen to her during that meeting. At that time, she would not have been found competent to stand trial.
- Six weeks later, after taking antipsychotic medication, she was horrified by the memories of what she had done and would have been found competent to stand trial, if the issue had been raised. I was amazed at how the antipsychotic medication impacted her.
- I have no doubt that Judge Ashe is going to conduct a hearing and find that the Government has established the four factors of the *Sell* test by clear and convincing evidence and that James will be medicated against her will, found to be competent, prosecuted, convicted and sentenced by the court.
- The Government will win and James will lose – but only after she is forced to take a medication that she does not want. Painful.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 235th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.