



Conducting Forced Medication Hearings under United States v. Sell

A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS

PRESENTED BY: CASSIE TRUEBLOOD

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Overview

1. Ethical obligations surrounding Sell hearings
2. Pre-hearing logistics
3. US v. Sell and subsequent cases
4. Challenge to the “dangerousness” basis for forced medication
5. Preparing for the hearing
6. Conducting the hearing

Ethical Obligations in Sell Hearings

RPC 1.14 – Clients with diminished capacity

-The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client

Remember – we
represent the client's
stated interest!!

The road to a Sell hearing



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BEHAVIORAL HEALTH ADMINISTRATION

• Western State Hospital • 9801 Steinbock Blvd SW • Lakewood, WA 98450-7218 •

April 2, 2024

Miss Tina Blenck,
Suicidist County Prosecuting Attorney
3000 Roosevelt Ave.
Everett, WA 98201

Cause # [REDACTED]

Dear Miss Tina Blenck,

[REDACTED] was found incompetent to stand trial of felony charges and committed to WSH pursuant to a court order dated March 12, 2024. WSH was not given permission to medicate the defendant over his objection. The defendant has been unwilling to actively participate in treatment, to include voluntarily taking prescribed medications. There has been no improvement in the symptoms of mental illness that, in the opinion of the undersigned, underlie the lack of capacities relevant to competency to stand trial.

Given the nature of the defendant's mental disorder, a medically necessary component of psychiatric treatment for this individual would entail the use of antipsychotic medications. There is no less intrusive form of treatment that would be expected to be likely to appreciably reduce the symptoms of his mental disorder other than antipsychotic medications. *Therefore, it is respectfully requested the treating facility be granted judicial authority to keep the defendant with antipsychotic medications involuntarily.* The prognosis for reduction of the defendant's mental symptoms without clinically indicated medication is extremely poor. Assuming that the defendant's mental symptoms can be sufficiently reduced to restore competence, the potential side effects (farray) of antipsychotic medication(s) would now be expected to impair this individual's capacity to assist in his defense.

As such, I respectfully request that a hearing be held to address the issue of involuntary medication. Without such medication, it is my opinion that the defendant will not be recoverable.

Thank you for your attention to this matter.

Sincerely,

Dr. N. Karolik, MD, Psychiatrist
Email: ntkarik1@shs.wa.gov
Phone: 253-755-2658

N. Karolik, MD

CC: Defense Counsel
The Presiding Judge
CFS Admissions Coordinator

What do you do when you get this letter?

- Contact your client
- Wait
- It is the prosecutor's obligation to set the hearing, not yours

Caselaw leading up to Sell

Individuals have a “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”. *Washington v. Harper*, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 1036 (1990).

Because of an individual’s substantial liberty interest in avoiding unwanted antipsychotic drugs, the court has demanded “a finding of overriding justification and a determination of medical appropriateness” before an involuntary medication may be issued.” *Riggins v. Nevada*, 504 U.S. 127, 135 (1992)

Criteria for Forced Medication under Sell (USSC 2003)



1. Important governmental interests



2. Involuntary medication must significantly further those interests



3. Medication is necessary to further those interests



4. Medication is medically appropriate

Step 1: Important Governmental Interest

First question: Is this a “serious crime?”

No WA court has analyzed what is a “serious crime” for Sell purposes.

Look at: RCW 10.77.092 for a list of per se serious offenses.

If not on the list, federal caselaw suggests the appropriate way to determine if a crime is “serious” is to look at the Sentencing Guidelines. *US v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2007)

Mitigating factors for serious crimes

Sell lists three mitigating factors which may undermine the State's interest, even if the charged crime is a "serious crime."

1. whether the defendant has been confined for a significant time
2. whether the defendant would qualify for civil commitment
3. the length of potential future confinement if the defendant is returned to competency.

Step 2: Medication must significantly further the government interest

The State must show that involuntary medication is “substantially likely to render the defendant competent.”

At the same time, the State must prove that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a defense, thereby rendering the trial unfair.



Step 3: Medication is necessary to further the interest

Court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.

Step 4: Medical appropriateness

- ▶ Health and Safety Concerns
- ▶ Dosage amounts
- ▶ What drug(s) they want to give

What about dangerousness?

What the State argues:

That Sell authorizes two bases for forced meds:

1. Safety of others/dangerousness
2. Restore competency

THIS IS NOT CORRECT!!!

History of the dangerousness analysis

Washington v. Harper, USSC 1990 (pre-Sell)

- Analyzed a WA DOC policy to force meds to those imprisoned in DOC facilities whom DOC felt were dangerous to other inmates or staff
- Found that DOC does have a compelling interest such that they can force meds
- Found that the procedures used by DOC were appropriate under due process

Where the State errs

The State conflates Harper and Sell and argues that medication can be forced solely on the issue of dangerousness. This is not what Sell says!

From Sell: “We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial*.” (emphasis in original)

Framework laid out in Sell



Sell requires the State to FIRST consider alternative basis for forcing medications before forcing them for the purposes of restoration.



What basis? ITA process



Why does Harper not apply for the “safety of the hospital?” Because they are ONLY in the hospital for competency restoration. A less intrusive way to keep the hospital safe would be for your client not to be there because they can’t be restored.

What Sell says:

If a court authorizes medication on an alternative ground, such as dangerousness, the need to consider authorization on trial competence grounds will likely disappear. There are often strong reasons for a court to consider alternative grounds first. For one thing, the inquiry into whether medication is permissible to render an individual nondangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent. For another, **courts typically address involuntary medical treatment as a civil matter.**

Sell at 167 - 168

And:

For another thing, courts typically address involuntary medical treatment **as a civil matter**, and justify it on these alternative, Harper-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication— when in the best interests of a patient who lacks the mental competence to make such a decision. And courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others.



Harper

If the State does try to argue that forced meds are appropriate under a Harper/dangerousness analysis, it has to be dangerousness IN THE FACILITY. Not general dangerousness or dangerousness in the community.

Preparing for the Hearing

Gather the documents you need

All WSH records (can sometimes be time consuming/difficult to get)

List of meds they want to give and dosages

Who is going to testify for WSH – treating doctor or someone else?

Do you need an expert? To testify or to consult?

During the Hearing

Focus your cross on the four Sell factors, specifically that it must be **SUBSTANTIALLY LIKELY** that medication will restore your client to competence.

WHO is testifying for the State – they need an MD

How much time do they have left on the period of restoration?

Post-Hearing Considerations



Potential Outcomes:



- What happens if the court rules in favor of forced medication



- Options if the ruling is unfavorable



- Talk to your client afterwards about what happens now

Questions?

Feel free to reach out to me!

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