

Finding Middle Ground: Compelling the Use of Psychotropic Medications for Pretrial Detainees

By Patricia Gray, M.A., M.Ed., J.D., LL.M. Candidate

With the passage of Senate Bill 1057 on April 30, 2003, Texas became the first state in the country to authorize a court to order involuntary medication of a defendant in order for the defendant to remain competent to stand trial. This provision is part of a new criminal competency statute created to streamline the procedures for determination of competency to stand trial, and to ensure consistent application of the standard for competency across Texas. The legislation was developed through a two-year review of Texas' competency statutes and practices, but was passed before the recent Supreme Court decision in *Sell v. United States*.¹

Texas has long had a procedure in place to allow for involuntary medication to restore competency, but, like many states, has encountered difficulty in some cases with the issue of maintaining competency for trial.

Will the Texas statute withstand a challenge in light of the decision rendered in *Sell v. United States*? As chair of the subcommittee which developed this part of Senate Bill 1057, I believe it will.

The standards adopted in the Texas legislation are a combination of standards set out in three circuit court opinions: *United States v. Gomes*², *United States v. Weston*³, and *United States v. Sell*.⁴ Although all three of these defendants had criminal histories that included violence or the threat of violence, none had been deemed "dangerous to self or others" at the time of their competency hearings as that standard has been defined for purposes of allowing involuntary use of medication. Examination of these three appellate decisions helped the legislature define a consensus position on when or whether a pretrial detainee can be involuntarily medicated for the purpose of restoring and maintaining the detainee's competence to stand trial.

There were common factors in all three appellate decisions. All three concluded that a defendant who is deemed dangerous to himself or others could be involuntarily medicated under certain circumstances. All agreed that the need for involuntary medication should be based on "clear and convincing" evidence. All three opinions addressed a concern that bringing a defendant to trial must meet some essential government interest. Finally, all agreed that the prescribed medication must be medically necessary and appropriate, and that the use of medication not interfere with a defendant's rights to participate in his own trial. This latter measure includes both the right to consult with counsel in a meaningful way as well as the defendant's ability to react appropriately to trial evidence and proceedings.

Bill 1057 provides that a defendant who has been found incompetent to stand trial, and for whom a continuity of care plan includes medication, may be compelled to take the medication if the Court determines by clear and convincing evidence that the prescribed medication is medically appropriate, that taking medication will not unduly prevent the defendant from participation in the trial, that it is in the best medical interest of the defendant to take the medication, that the benefits of medication are greater than potential harmful side effects, that the state has a clear and compelling interest in the defendant maintaining competency to stand trial, that no other less invasive means of maintaining the defendant's competency exists, and that the prescribed medication will not unduly prejudice the defendant's rights at trial.⁵

The legislature paid particular attention to the Eighth Circuit opinion in the *Sell* case since this case was argued before the United States Supreme Court while the legislature was in session. The appellate opinion in *Sell* set out the following criteria:

1. The government must present an essential state interest that outweighs the individual's interest in remaining free from medication.

2. The government must prove that there is no less intrusive way of fulfilling its essential interest.
3. The government must prove by clear and convincing evidence that the medication is medically appropriate. Medication is medically appropriate if:
 - (1) it is likely to render the patient competent;
 - (2) the likelihood and gravity of side effects do not overwhelm its benefits; and
 - (3) it is in the best medical interests of the patient.⁶

Also of note in the majority opinion from the Eighth Circuit is the discussion of the impact of atypical antipsychotics, the so-called "new generation" drugs, used to treat mental illness because there was no consensus among the testifying experts that Sell's particular disorder would, in fact, respond to the use of such drugs (or, indeed, to the use of older medications).⁷

The Eighth Circuit concluded that, even though the trial court had not specifically applied these standards in its review, that the trial court's ruling should, nevertheless be upheld, and that its determination that Sell could be involuntarily medicated for the purposes of attempting to restore his competency to stand trial should be sustained.⁸ In a strong dissent, Justice Bye noted that Sell's case presents a vexing challenge. He detailed the differences between Sell, whose crimes are essentially financial in nature, and Russell Weston whose alleged crimes include murder inside the United States Capitol. The dissent also cautioned that compelling the forcible use of antipsychotic medications may be justified in "incontestably serious crimes," but not necessarily in less serious crimes.

The *Sell* opinion was rendered after the legislature adjourned. The Supreme Court ruled that although a criminal defendant may be involuntarily medicated under certain circumstances, those circumstances will be rare. The opinion further states that medication solely for the purpose of rendering a defendant competent to stand trial, absent the factors outlined by the majority, will not be sustained. In particular, the Court directs that there must first be an inquiry into why a specific defendant needs medication, especially if there is no finding that he represents a danger to himself or others. The Court also seemed loath to override a defendant's refusal to accept medication if the term of confinement for treatment was near or equal to any sentence the defendant might receive if convicted.

Under the Texas statute, it is likely that compelling medication to maintain competency to stand trial will be equally rare. The statute directs that misdemeanor charges against a defendant shall be dismissed if the defendant cannot be restored to competency within two years of the time he is found to be incompetent. In addition, a defendant is entitled to time credit on his sentence for any time he is confined to a residential treatment facility while receiving treatment to restore him to competency. Although the Texas statute does not directly address the question of "dangerousness to self or others" as an initial inquiry, the provisions that medication be both medically appropriate and that the state have a clear and compelling interest in having the defendant stand trial would seem to meet the safeguards set in the Supreme Court decision.

With its adoption of Senate Bill 1047, the Texas legislature attempts to define both procedurally and substantively a standard for determining when and whether someone accused of crime can be involuntarily medicated in order to maintain competency to stand trial. When and whether such standards will be applied remains to be seen.

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1. *Sell v. United States*, ___ U.S. ___, 123 S. Ct. 2174 (2003).

2. *United States v. Gomes*, 289 F.3d 71 (2d Cir. 2002).

3. *United States v. Weston*, 255 F. 3d 873 (D.C. Cir. 2001), cert. denied, *Weston v. United States*, 534 U.S. 1067, 151 L. Ed. 2d 583, 122 S. Ct. 670 (2001).

4. *United States v. Sell*, 282 F.3d 560.

5. Senate Bill 1057, Art. 46B.086(d), 78th Legislature.

6. *Sell*, *supra* at 570.

7. *Id.* at 573.

8. *Id.*