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United States v. Ruiz-Gaxiola: Setting the Standard For Medicating Defendants Involuntarily in the Ninth Circuit

Michelle R. Cruz

CASE SUMMARY

UNITED STATES v. RUIZ-GAXIOLA: SETTING THE STANDARD FOR MEDICATING DEFENDANTS INVOLUNTARILY IN THE NINTH CIRCUIT

INTRODUCTION

In *United States v. Ruiz-Gaxiola*, the United States Court of Appeals for the Ninth Circuit held that the government could not medicate a defendant involuntarily for the sole purpose of rendering the defendant competent to stand trial.[1] The court relied on the *Sell* test in making its determination.[2] In *Sell v. United States*, the United States Supreme Court established a four-pronged test for determining whether a court should grant a request to medicate a defendant involuntarily.[3] A court may not grant such a request unless the government shows that (1) an important government interest is at stake in prosecuting the defendant to be medicated, (2) medicating the defendant involuntarily will significantly further the important government interest, (3) medicating the defendant involuntarily is necessary to further the important government interest, and (4) the involuntary medication of the defendant is medically appropriate.[4] The Ninth Circuit held that because the government failed to establish the facts necessary to satisfy all four

[1] United States v. Ruiz-Gaxiola, 623 F.3d 684 (9th Cir. 2010).

[2] *Id.*; *see also* Sell v. United States, 539 U.S. 166, 180-81 (2003).

[3] *Sell*, 539 U.S. at 180-81.

[4] *Id*.

prongs of the *Sell* test by clear and convincing evidence, the district court erred in authorizing the involuntary medication of the defendant.[5]

I. FACTS AND PROCEDURAL HISTORY

On June 27, 2006, Vicente Ruiz-Gaxiola (Ruiz) was arrested for illegally reentering the United States after being deported.[6] If found guilty of the charge, Ruiz faced the sentencing guidelines' suggested imprisonment of 100 to 125 months.[7]

After Ruiz's arrest, his attorney moved for an evaluation of Ruiz's competency to stand trial.[8] Ruiz was subsequently diagnosed with Delusional Disorder, grandiose type,[9] and found incompetent to stand trial.[10] The magistrate judge committed Ruiz to the custody of the Attorney General, whereupon he was transferred to the Federal Medical Center in Butner, North Carolina ("FMC"), and evaluated to determine the potential for his competence to be restored.[11] After his evaluation at FMC, where Ruiz's diagnosis was confirmed, the staff members who evaluated him recommended that Ruiz take psychotropic medication.[12] He refused.[13] In a written report, the evaluators requested that the court issue an order allowing FMC to medicate Ruiz against his will for the sole purpose of restoring his competency for trial.[14] The report acknowledged the need to prove all of the *Sell* factors, and explained why, in the opinion of the evaluators, all of the factors were satisfied.[15]

Because the Ninth Circuit disfavors *Sell* orders,[16] the magistrate judge first sought to answer the government's request on an alternative basis and ordered a *Harper* hearing[17] to determine whether Ruiz was

[5] *Ruiz-Gaxiola*, 623 F.3d at 707.

[6] *Id*. at 688.

[7] *Id*.

[8] *Id*.

[9] *Id*. at n.1 ("The 2006 Merck Manual of Medicine describes Delusional Disorder as a distinct disorder 'characterized by non-bizarre delusions (false beliefs) that persist for at least 1 [month], without other symptoms of schizophrenia.' The Manual describes the disorder as uncommon, and with respect to the grandiose subtype, notes that 'the patient believes he has a great talent or has made an important discovery.'").

[10] *Id*. at 689.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*. (citing United States v. Rivera-Guerrero, 426 F.3d 1130, 1137 (9th Cir. 2005)).

[17] The Supreme Court in Washington v. Harper, 494 U.S. 210 (1990) held, inter alia, that medically treating a prisoner against his or her will does not violate substantive due process if the

gravely disabled or a danger to himself or others.[18] Ruiz was found to be neither.[19] The magistrate judge then held a *Sell* hearing.[20]

Two co-authors of the FMC report testified as expert witnesses for the government.[21] First was Dr. Mark Cheltenham, a staff psychiatrist who had been at FMC for seventeen months.[22] As of the date of the hearing, Dr. Cheltenham had not been board certified in psychiatry.[23] Second was Carlton Pyant, a forensic psychologist who had been with the Bureau of Prisons for fifteen years.[24] Dr. Cheltenham met with Ruiz four or five times for a total of approximately three hours, and Dr. Pyant met with Ruiz at least seven times.[25] The expert witness for the defense, Dr. Robert Cloninger, was a psychiatrist with extensive credentials ranging from a private psychiatric practice to professorship at Washington University, and he had published hundreds of articles and several books on the subject of psychiatry.[26] Dr. Cloninger met with Ruiz via video teleconference for two hours and ten minutes.[27] In addition, he reviewed Ruiz's competency report, the FMC report, and the *Harper* hearing report.[28]

Both sides agreed that Ruiz was incompetent to stand trial, but they disagreed as to whether he should be medicated against his will.[29] At the hearing, Dr. Cheltenham stated that he believed the proposed use of the drug Haldol Decanoate[30] as a treatment was substantially likely to restore Ruiz's competence and unlikely to cause side effects in the short period of time that the drug would be administered for the trial.[31] He also opined that, because Ruiz was refusing to take any medication, there was no less-intrusive alternative available and that the treatment was medically appropriate.[32] Conversely, Dr. Cloninger opined that use of

prisoner is found to be a danger to himself or herself or others. A *Harper* hearing evaluates evidence to make such a determination.

[18] *Ruiz-Gaxiola*, 623 F.3d at 689 (citing *Harper*, 494 U.S. 210).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 690.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 689.

[31] *Id*. at 690.

[32] *Id*.

the drug would likely exacerbate Ruiz's delusions rather than restore competency, and that he would immediately face the risk of serious and possibly irreversible side effects from the medication.[33] He further stated that the proposed treatment was not medically appropriate and that a less-intrusive alternative was available in the form of a "trusting therapeutic alliance."[34]

On June 3, 2008, the magistrate judge issued a Report and Recommendations.[35] He found that the government had met its burden of proving each of the *Sell* factors by clear and convincing evidence, and he recommended that the district court grant the government's request.[36] Ruiz filed objections with the district court and requested a stay in the event that the district court followed the magistrate judge's recommendation.[37]

On August 19, 2008, the district court denied Ruiz's objections and adopted the magistrate judge's findings of fact and conclusions of law and authorized the government to medicate Ruiz against his will.[38] The court stayed the order for thirty days to allow Ruiz to appeal the decision.[39] On September 17, 2008, the Ninth Circuit stayed the order of the district court pending resolution of the appeal.[40]

II. NINTH CIRCUIT ANALYSIS

The Ninth Circuit began its discussion by recognizing that the United States Supreme Court has, on three occasions, "recognized a liberty interest in freedom from unwanted antipsychotic drugs"[41] and has only allowed involuntary medication in "highly-specific factual and medical circumstances."[42]

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 691.

[41] *Id.* (citing United States v. Williams, 356 F.3d 1045, 1053 (9th Cir. 2004)); *see also* Sell v. United States, 539 U.S. 166 (2003); Riggins v. Nevada, 504 U.S. 127 (1992); Washington v. Harper, 494 U.S. 210 (1990).

[42] *Ruiz-Gaxiola*, 623 F.3d at 691 (citing United States v. Rivera-Guerrero, 426 F.3d 1130, 1136 (9th Cir. 2005)).

A. STANDARD OF PROOF

When the Supreme Court decided *Sell*, it did not explicitly set forth the standard of proof that must be met by the government to establish the *Sell* factors, nor had the Ninth Circuit addressed the issue of standard of proof in this context.[43] Due in part to the "particularly severe" interference with a person's liberty, the Ninth Circuit reasoned that *Sell* inquiries "call[] for a more stringent burden of proof."[44] Agreeing with every other circuit that has addressed the issue, the Ninth Circuit concluded that the government must prove all prongs of the *Sell* test by clear and convincing evidence.[45]

B. *SELL* TEST

In *Sell v. United States*, the Supreme Court established a four-pronged test to determine when it is constitutionally permissible to administer antipsychotic medications against a person's will.[46] The Court announced that the factors should not be treated as a balancing test; rather, the government must prove each factor independently by clear and convincing evidence.[47]

The first factor, the government's interest in prosecuting Ruiz, was primarily a legal issue.[48] Thus, the Ninth Circuit reviewed the district court's ruling on the first factor de novo.[49] The remaining three factors required the court to consider the testimony of expert witnesses and evaluate medical evidence.[50] Thus, those factors were reviewed for clear error.[51] Clear error occurs when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[52]

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[43] *Id.*

[44] *Id.* at 692.

[45] *Id.*; *see* United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); *see also* United States v. Grape, 549 F.3d 591, 598 (3d Cir. 2008); United States v. Payne, 539 F.3d 505, 508-09 (6th Cir. 2008); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004).

[46] *Ruiz-Gaxiola*, 623 F.3d at 691; *see Sell*, 539 U.S. at 180-81.

[47] *Ruiz-Gaxiola*, 623 F.3d at 691.

[48] *Id.* at 693.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* (quoting United States v. Hinkson, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc)).

1. Whether Important Government Interest Is at Stake

The first prong of the *Sell* test requires that the government prove it has an "*important* government interest" in prosecuting the defendant.[53] When determining whether a government interest is important, the court weighs several considerations, with each case evaluated on its own distinct facts.[54] There are circumstances in which particular facts will lessen an otherwise important government interest.[55] For example, if a defendant refuses to be medicated and as a result has been confined for a period of time as long as or longer than the sentence recommended for the offense for which he or she is charged, the government's interest in forcing that defendant to be medicated and brought before the court to stand trial would be diminished.[56] The court uses the sentencing guideline range as a *starting point* to determine whether a crime is serious enough to satisfy this first prong.[57]

Here, because of Ruiz's extensive criminal history, the guidelines suggested a sentence of 100-125 months.[58] In addition, the fact that Ruiz was arrested just fourteen months after he was released from prison served to tip the balance toward finding an important government interest.[59] Although there appeared to be no possibility that Ruiz would be subject to a civil confinement based on his mental illness, he had been incarcerated for more than forty-seven months since his arrest.[60] However, the court noted, because of the length of Ruiz's suggested sentence, he would still be subject to an additional fifty-three to seventy-eight months behind bars.[61] The court also considered the likelihood Ruiz would reenter the country again illegally.[62] Because of his mental condition, Ruiz believed God wanted him to be in the United States.[63] Although the court declined to address whether this circumstance would make prosecution of Ruiz more or less important, the court, for purposes of this case, "assume[d]" that this prosecution was an important

[53] *Id.* (quoting Sell v. United States, 539 U.S. 166, 180 (2003)).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 694 (citing United States v. Hernandez-Vasquez, 513 F.3d 908, 919 (9th Cir. 2008)).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 695.
[62] *Id.*
[63] *Id.*

government interest. Therefore, the district court did not err in determining that the government proved the first prong of the *Sell* test.[64]

2. Whether Involuntary Medication Will Further Government Interest

Under the *Sell* test, the second prong requires that the government prove that "'involuntary medication will *significantly further*' its interest in prosecuting the defendant for the charged offense."[65] This prong has two parts: (1) "that administration of the drugs is substantially likely to render the defendant competent to stand trial," and (2) "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 trial defense, thereby rendering the trial unfair."[66] After hearing testimony from both the government's and the defendant's experts, the magistrate judge set forth his findings in his Report and Recommendations.[67] He concluded that the treatment proposed by the government was

> *designed* to reduce Defendant's delusions, restore normal thought processes, improve cognitive functioning in the courtroom and enable Defendant to assist his attorney. *Consequently*, the medication is substantially likely to render Defendant competent to proceed to trial and substantially unlikely to produce side effects that would interfere with Defendant's ability to assist his attorney or that would be harmful to him.[68]

The Ninth Circuit emphatically disagreed with the magistrate judge's reasoning that because a treatment is *designed* to do something means that it will do what it was designed to do.[69] The second prong requires that the government prove *what* its treatment is substantially likely to do (and what it is not substantially likely to do, i.e., cause dangerous side effects); thus, proving only what it was *designed* to do is insufficient.[70] The government must prove that the treatment is substantially likely to restore competency.[71]

The Ninth Circuit also found that the magistrate judge failed to

[64] *Id.*
[65] *Id.* (quoting Sell v. United States, 539 U.S. 166, 181 (2003)).
[66] *Id.* (quoting *Sell*, 539 U.S. at 181).
[67] *Id.* at 695-96.
[68] *Id.* at 696 (quoting magistrate judge's Report and Recommendation).
[69] *Id.*
[70] *Id.*
[71] *Id.*

make any findings of fact as they pertained to the second prong.[72] In addition, the court noted that the district court failed to comply with procedural safeguards that are required when a person's liberties are at stake.[73] The Ninth Circuit pointed out that such a failure on the part of the district court, in and of itself, would prevent it from upholding the district court's involuntary medication order.[74] In some cases, remand at that point would be appropriate to allow the district court to make the necessary findings of fact. In this case, however, a review of the record convinced the court of appeals the district court on remand would not be able to make any findings that would support a conclusion that the government had satisfied the second prong.[75]

Reviewing the record, the Ninth Circuit considered two questions that were vigorously disputed.[76] First, the court considered whether the use of antipsychotic drugs is a clinically accepted treatment for Delusional Disorder.[77] Second, the court evaluated whether a 2007 study conducted at FMC establishes that involuntary medication of detainees with Delusional Disorder restores competency.[78]

As to the first issue, the government evaluators in Ruiz's FMC evaluation report opined that the use of antipsychotic drugs is the accepted and appropriate treatment for individuals with Delusional Disorder.[79] However, the government offered only Ruiz's evaluation report without any published authority in support of its contentions.[80] In contrast, the defense expert, Dr. Cloninger, testified that there is no clinical consensus as to whether Delusional Disorder should be treated with antipsychotic medications.[81] The defense supported its contention by introducing into evidence the Merck Manual of Medicine (considered to be the medical equivalent to Black's Law Dictionary), which states that the established treatment for Delusional Disorder is "an effective physician-patient relationship" and that there is insufficient data available to support the use of drugs in the treatment.[82] The government's expert witness, Dr. Cheltenham, later admitted there was

[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 697.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* (quoting THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1573 (Mark H. Beers et al. eds., 18th ed. 2006)).

"no explicit practice guideline or consensus on . . . how to treat patients with delusional disorder, and particularly as it regards medications."[83] Based on the conflicting testimony, the court found that there was no support for the contention that the proposed treatment would be likely to restore Ruiz to competency.[84]

As to the second question, the government offered the results of a study completed at FMC in which twenty-two incompetent, non-violent pretrial detainees with Delusional Disorder were treated with antipsychotic medications.[85] Dr. Cheltenham testified that seventy-seven percent of the treated detainees were restored to competency;[86] however, the defense argued that the FMC study lacked untreated control subjects and cited other studies that had similar results without the use of antipsychotic medications.[87] In addition, Dr. Cloninger pointed out that the subjects in the study were not being involuntarily medicated.[88] In his opinion, the involuntary medication of Ruiz was likely to worsen his condition because he would fight back due to a feeling of powerlessness.[89]

The Ninth Circuit found that the government mainly "relied on the effects of antipsychotic medication on delusional thought processes generally, rather than evidence specific to the particular mental illness from which Ruiz suffers."[90] The court further noted that the expertise and knowledge of Dr. Cheltenham, the expert for the government, regarding Delusional Disorder was far outweighed by that of Dr. Cloninger, the defense expert.[91] As a result, the court concluded that "the generalized statements and unsupported assertions of the government experts, when contrasted with the specific and authoritative rebuttal evidence presented by the defense," were insufficient to prove by clear and convincing evidence that the proposed treatment of involuntary medication was substantially likely to restore competency.[92] Thus, the court held that the district court erred in finding that the government proved the second prong by clear and convincing

[83] *Id*.
[84] *Id.*
[85] *Id.* at 698.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 698-99.
[89] *Id*. at 699.
[90] *Id.*
[91] *Id*. at 699-700.
[92] *Id*. at 701.

evidence.[93] Because the court found against the government on the first part of the prong, it did not address the second part of the prong, whether the treatment was substantially unlikely to cause dangerous side effects.[94]

3. Whether Involuntary Medication Is Necessary to Further Government Interest

Under the third prong of the *Sell* test, the government must prove that the proposed treatment is *necessary* to further the important government interest and that "any alternative, less intrusive treatments are unlikely to achieve substantially the same results."[95] In order for the court to find that involuntary medication is necessary it is a natural prerequisite that the second prong first be satisfied.[96] Here, the fact that the government failed to prove that medicating Ruiz against his will would further an important government interest meant it would be impossible to then prove that involuntarily medicating Ruiz was necessary to accomplish that important government interest.[97] Nevertheless, the court went on to evaluate the evidence as if the second prong of the *Sell* test had been established.[98]

The defense favored a treatment that was less intrusive than medication and suggested a "therapeutic alliance" between a private psychiatrist and Ruiz.[99] The magistrate judge found that this alternative was unlikely to achieve the same results as the government's proposed involuntary medication.[100] The magistrate reasoned that the defense expert's proposal was based on only two hours and ten minutes of teleconference interviews while the government experts spent substantially more time with Ruiz.[101] The Ninth Circuit was troubled by this reasoning because of the common nature of cases that are evaluated under the *Sell* test; defendants are generally detained in federal medical centers, and therefore, government experts are far more likely to have more time with the defendant.[102] Thus, the amount of time spent with the defendant should not have been the main basis for such a finding.[103]

[93] *Id.*
[94] *Id.* at 701 n.12.
[95] *Id.* at 701 (quoting Sell v. United States, 539 U.S. 166, 181 (2003)).
[96] *Id.*
[97] *Id.*
[98] *Id.* at 701-03.
[99] *Id.* at 701.
[100] *Id.* at 702.
[101] *Id.*
[102] *Id.*
[103] *Id.*

However, based on other factors, specifically that Ruiz did not believe he was mentally ill, did not believe that he needed any medication or treatment, and believed there was a conspiracy against him, the Ninth Circuit reasoned that it would be unlikely that he would voluntarily participate in a therapeutic treatment as proposed by the defense.[104] Thus, the court determined that if the government had established the second prong, it would also have established the third prong.[105]

4. Whether Administration of the Medication Is Medically Appropriate

Reflecting the importance of the liberty interests at issue, the fourth and final prong of the *Sell* test requires that the government prove by clear and convincing evidence that the proposed treatment is "in the *patient's* best medical interest in light of his medical condition."[106] The Ninth Circuit pointed out that the Supreme Court's use of the word "patient," in this prong, as opposed to "defendant" in the other prongs, demonstrates that courts must consider the long-term medical consequences to the patient rather than the short-term interests of the government.[107]

The magistrate judge found that the government satisfied this prong of the *Sell* test.[108] The Ninth Circuit, however, disagreed and explained that the magistrate judge had erroneously relied on his flawed analysis in prong two to find that the government satisfied its burden in prong four.[109] The Ninth Circuit explained that, while the second prong requires that the treatment be substantially likely to restore competence and substantially unlikely to cause harmful side effects, the fourth prong requires that the court "consider *all* of the medical consequences of the proposed involuntary medication, including those consequences that may . . . result in long term side effects."[110] Both the prosecution and defense agreed that Haldol could cause harmful side effects such as tardive dyskinesia, described as a "very disfiguring side effect that can affect muscles anywhere in the body."[111] The experts testified that tardive dyskinesia can be reversed in up to fifty percent of patients if it is

[104] *Id.* at 702-03.
[105] *Id.* at 703.
[106] *Id.* (quoting Sell v. United States, 539 U.S. 166, 181 (2003), and adding emphasis).
[107] *Id.*
[108] *Id.* at 703-04.
[109] *Id.* at 704.
[110] *Id.*
[111] *Id.* at 705.

detected early.[112] The government argued that the treatment would be administered only for the duration of the trial and that the side effects would be unlikely to occur in that short period of time.[113] It was undisputed, however, that if Ruiz did not continue to take the medications indefinitely, the positive effects of the drugs would end.[114] Thus, the court noted, from Ruiz's standpoint, the benefit of being competent for the short period of trial and then being returned to a delusional state was not worth even the small risk of a disfiguring side effect.[115] The court again stated that the government failed to offer any evidence that Haldol would render Ruiz competent for the duration of trial preparation and trial.[116]

For the above reasons, the court found that the district court erred in concluding that the government proved by clear and convincing evidence that the proposed treatment was in Ruiz's best medical interest in light of his medical condition.[117]

III. HOW OTHER CIRCUITS HAVE ADDRESSED THE *SELL* FACTORS

Since the Supreme Court handed down its decision in *Sell*, several circuits have been faced with the task of determining whether the government successfully proved all four of the *Sell* prongs when it requested an order to involuntarily medicate a defendant.[118] Although all circuits to date have agreed that the standard of proof should be that the government must prove each and every prong by clear and convincing evidence, what constitutes sufficient proof for each prong is still subject to disagreement.[119]

There seems to be general agreement among the circuits when it comes to the first prong of the *Sell* test.[120] Overwhelmingly, courts

[112] *Id.*

[113] *Id.* at 706.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *See, e.g.*, United States v. Diaz, 630 F.3d 1314 (11th Cir. 2011); United States v. Fazio, 599 F.3d 835 (8th Cir. 2010); United States v. Grape, 549 F.3d 591 (3d Cir. 2008); United States v. Green, 532 F.3d 538 (6th Cir. 2008); United States v. Bradley, 417 F.3d 1107 (10th Cir. 2005).

[119] *Compare, e.g.*, *Fazio,* 599 F.3d at 841 (accepting the testimony of a psychiatrist (a medical doctor) who had worked closely with the defendant and whose opinion addressed the specific defendant's medical condition), *with Bradley,* 417 F.3d at 1114-15 (finding that the testimony of a psychologist (a Ph.D.) stating that the proposed treatment was "[t]he treatment of choice for a psychotic disorder" was sufficient).

[120] *See Fazio,* 599 F.3d at 840; *Grape*, 549 F.3d at 600; *Green,* 532 F.3d at 547; *Bradley,* 417 F.3d at 1116.

agree, and *Sell* itself seems to confirm, that prosecuting a serious crime is, in and of itself, an important government interest.[121] To prove that the crime in the case at issue is *serious*, the general opinion is that the sentencing guidelines are the appropriate place to start.[122] The courts do not specifically elaborate, but the obvious implication is that the longer the suggested sentence, the more likely the court would be to hold that a given crime is serious.[123] The Sixth Circuit added that violence, although an important factor, is not required to find that a crime is serious.[124] The Sixth Circuit also found that the crime need not be one against person or property to be considered serious.[125] After considering the sentencing guidelines, the Third Circuit noted that courts should also consider mitigating factors before determining that the involuntary medication of the defendant is an important government interest.[126] Although different circuits specify different considerations, there does not seem to be a conflict among the circuits on the first prong of the *Sell* test.[127]

There is less agreement among the circuits when it comes to their analysis of the evidence required for the second prong of the *Sell* test.[128] The second prong requires the government to prove that the proposed treatment is substantially likely to render the defendant competent while substantially unlikely to cause side effects that would hinder the defendant's ability to aid in his or her defense.[129] As to part one, in cases where there was an actual medical history of the defendant responding well to the proposed medications, the analysis was brief, as may be expected.[130] In cases where the defendant has no personal history of using medication, however, courts have given great deference to statistical data as explained by government experts.[131] In trusting the opinion of a government expert, one circuit went so far as to find that the

[121] *See, e.g.*, Sell v. United States, 539 U.S. 166, 180 (2003); *Fazio*, 599 F.3d at 840; *Grape*, 549 F.3d at 600; *Green*, 532 F.3d at 547; *Bradley*, 417 F.3d at 1116.

[122] *See, e.g., Grape*, 549 F.3d at 600; *Green*, 532 F.3d at 547.

[123] *See, e.g., Grape*, 549 F.3d at 600; *Green*, 532 F.3d at 547.

[124] *Green*, 532 F.3d at 548.

[125] *Id*. at 551.

[126] *Grape*, 549 F.3d at 600.

[127] *See, e.g., Grape*, 549 F.3d at 600-03; *Green*, 532 F.3d at 547-51.

[128] *Compare, e.g.*, United States v. Fazio, 599 F.3d 835 (8th Cir. 2010) (providing very little analysis of drug side-effects), *with Green*, 532 F.3d 538 (considering more thoroughly what the side effects of the medications will be).

[129] Sell v. United States, 539 U.S. 166, 181 (2003).

[130] *See Grape*, 549 F.3d at 603-05; *Green*, 532 F.3d at 552-54.

[131] *See Fazio*, 599 F.3d at 840-41; United States v. Bradley, 417 F.3d 1107, 1114-15 (10th Cir. 2005).

expert's testimony that "[h]e was *guardedly optimistic* that administration of antipsychotic medication would materially render aid in restoring [the defendant] to competency," was sufficient to support a finding that the medication was "substantially likely"[132] to render the defendant competent to stand trial.[133]

As to the second part of prong two, courts vary widely as to how much emphasis is placed on possible side effects.[134] Some courts appear to pay little or no attention to this requirement,[135] while others have placed significantly more weight on potential side effects.[136] Thus, there has been little consistency among the circuits when it comes to prong two of the *Sell* test.

In those circuits that have analyzed the third prong, the findings of the courts varied greatly.[137] The Tenth Circuit simply concluded, without any independent analysis, that absent clear error in the lower court's analysis of prongs two and four, involuntary medication of the defendant was necessary to further the important government interest.[138] The Eleventh Circuit, on the other hand, required proof from the government that no less-intrusive alternative was likely to accomplish the desired result.[139] There seems to be little agreement as to what is necessary to satisfy prong three.

Finally, when considering the fourth *Sell* prong, whether the proposed treatment is medically appropriate in light of a particular defendant's medical condition, circuits have again differed in what they have accepted as proof.[140] The Eighth Circuit determined that the government had met its burden with testimony from a psychiatrist who

[132] *See Sell*, 539 U.S. at 181.

[133] *Bradley*, 417 F.3d at 1115 (emphasis added).

[134] *Compare, e.g.*, *Fazio*, 599 F.3d 835 (8th Cir. 2010) (providing very little analysis of drug side-effects), *with Green*, 532 F.3d 538 (considering more thoroughly what the side effects of the medications will be).

[135] *See Fazio*, 599 F.3d at 840-41; *Grape*, 549 F.3d at 604-05; *Bradley*, 417 F.3d at 1115.

[136] *See* United States v. Diaz, 630 F.3d 1314, 1333-34 (11th Cir. 2011); *Green*, 532 F.3d at 553-54.

[137] *Compare Bradley*, 417 F.3d at 1117 (using its findings for prongs two and four to make its decision about prong three), *with Diaz*, 630 F.3d at 1335-36 (requiring independent proof from the government before making a decision about prong three).

[138] *Bradley*, 417 F.3d at 1117.

[139] *Diaz*, 630 F.3d at 1335-36.

[140] *Compare Fazio*, 599 F.3d at 841 (holding that opinion testimony from a medical doctor based on the defendant's current medical condition satisfied the government's burden as to the fourth *Sell* factor), *with Bradley*, 417 F.3d at 1112 (holding that the government satisfied its burden as to the fourth *Sell* factor with testimony from a clinical psychologist whose opinion was based on the standard treatment for the kind of condition the defendant had, rather than on the specific defendant's current medical condition).

had worked closely with the defendant.[141] In that case, the doctor recommended the proposed treatment based on the defendant's diagnosis and stated that the treatment was appropriate in light of the specific defendant's current medical condition.[142] The Tenth Circuit seemed to set a lower burden of proof for the government by determining that the fourth prong was satisfied by testimony from a psychologist who reported that "[b]ecause treatment with psychiatric medications is the intervention of choice for [the defendant's] condition, it is my opinion . . . that treatment of his illness with psychiatric medications is medically appropriate."[143] In that case, the expert's opinion was based on the normally accepted treatment for the defendant's disorder, but it did not seem to take into consideration any specific health conditions of the defendant.[144]

Based on these vast differences in analyses, it would appear that the appellate courts are unclear as to how exactly they should be analyzing the *Sell* factors.

CONCLUSION

As compared to other circuits that have addressed a *Sell* challenge, the Ninth Circuit gave a much more thorough and reasoned opinion as to how it read the requirements set forth by the Supreme Court. By establishing a standard of proof for *Sell* inquiries in *Ruiz-Gaxiola*, the Ninth Circuit has provided lower courts with a clear guideline to evaluate cases in which the government wishes to medicate non-violent, incompetent defendants against their will solely for the purpose of gaining competency for trial.[145] Although the Supreme Court had previously laid out specific requirements for such challenges, it failed to provide the standard by which the government must prove its case.[146]

In addition, the Ninth Circuit emphasized the importance of addressing each and every prong of the *Sell* test.[147] The government cannot rely on proof of one prong to establish another prong.[148] Although there is some overlap among the prongs, and multiple prongs can rely on similar facts, the purpose behind each prong is different and

[141] *Fazio*, 599 F.3d at 841.
[142] *Id.*
[143] *Bradley*, 417 F.3d at 1112.
[144] *Id.*
[145] United States v. Ruiz-Gaxiola, 623 F.3d 684, 692 (9th Cir. 2010).
[146] *Id.* at 691; *see* Sell v. United States, 539 U.S. 166 (2003).
[147] *Ruiz-Gaxiola*, 623 F.3d at 691.
[148] *Id.* at 704.

must be addressed separately.[149] The government, and the courts hearing these cases, must be mindful of the fact that a person's liberty is at stake and that in the United States such a restraint requires a showing of extreme circumstances.[150]

In *Ruiz-Gaxiola* the Ninth Circuit found that the government fell short of proving all four prongs of the *Sell* test by clear and convincing evidence.[151] Specifically, the government failed to prove that the proposed treatment – the involuntary medication of Ruiz with the drug Haldol – was substantially likely to restore competence and was in Ruiz's best medical interest.[152] Because the district court erred in finding to the contrary, the Ninth Circuit reversed the district court's order authorizing involuntary medication of Vicente Ruiz-Gaxiola.[153]

*MICHELLE R. CRUZ**

[149] *Id.* at 704-05.

[150] *Id.* at 691-93, 695-96, 703, 707.

[151] *Id.* at 707.

[152] *Id.*

[153] *Id.*

* J.D. Candidate, 2011, Golden Gate University School of Law, San Francisco, CA; B.S. Biological Sciences, 1995, California State University, Hayward, CA.