

Casenote

United States v. Diaz: The Gap Between Medication and Restoration

I. INTRODUCTION

In *United States v. Diaz*,¹ the United States Court of Appeals for the Eleventh Circuit, in a case of first impression, determined whether the state met its burden in applying the United States Supreme Court's test articulated in *Sell v. United States*,² to involuntarily medicate an incompetent, schizophrenic defendant.³ Based on the *Sell* test that was established in 2003,⁴ the court of appeals had to determine which evidentiary findings were sufficient to meet the clear and convincing evidence standard allowing the State of Georgia to forcibly medicate the appellant, Michael Diaz.⁵ The court of appeals found no clear error in the United States District Court for the Northern District of Georgia's decision to involuntarily medicate Diaz based on evidence of Diaz's uncooperative behavior and testimony concerning the effectiveness of

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1. 630 F.3d 1314 (11th Cir. 2011).
 2. 539 U.S. 166 (2003).
 3. *Diaz*, 630 F.3d at 1317.
 4. *Sell*, 539 U.S. at 169.
 5. *Diaz*, 630 F.3d at 1317.

alternatives.⁶ While involuntary medication may be Diaz's only chance at restoring trial competency, the Eleventh Circuit ultimately made its decision based on impersonal statistics lacking any practical guidelines.⁷

II. FACTUAL BACKGROUND

On January 27, 2004, and again on April 8, 2004, a SouthTrust Bank in Atlanta, Georgia, was robbed at gunpoint.⁸ Michael A. Diaz was arrested by the Atlanta Police Department while attempting to flee the scene of the second robbery.⁹ Diaz was subsequently charged with one count of possession of a firearm by a convicted felon,¹⁰ two counts of armed bank robbery, and two counts of using a firearm during a crime of violence.¹¹

While his trial was pending in the Northern District of Georgia, Diaz was examined by two doctors who disagreed about his competency.¹² Based on the testimony of both doctors at an October 2005 competency hearing, the district court deemed Diaz competent to stand trial.¹³ Diaz's motion to proceed pro se was granted so long as his court appointed attorney, Timothy Saviello, remained as standby counsel.¹⁴ Furthermore, Diaz seemingly requested to waive his Sixth Amendment¹⁵ right to a jury trial,¹⁶ which was also granted.¹⁷

6. *Id.* at 1335-36.

7. *See id.*

8. *United States v. Diaz*, 630 F.3d 1314, 1317 (11th Cir. 2011).

9. *United States v. Diaz*, 540 F.3d 1316, 1317 (11th Cir. 2008).

10. At the time of arrest, Diaz was "on supervised release for a prior conviction . . . in the Eastern District of Louisiana." *Id.* at 1317 n.2.

11. *Id.* at 1317.

12. *Diaz*, 630 F.3d at 1317. The Federal Detention Center in Miami, Florida, found Diaz to be competent after extensive interviews and psychological tests and even believed his psychological problems could be fabricated. *Diaz*, 540 F.3d at 1318. Diaz told the psychiatrist for the defense, Dr. Michael Hilton, that beginning at age thirteen his personality had been "vanquished" and since had "re-earthed" as six different identities. *Diaz*, 630 F.3d at 1317 (internal quotation marks omitted). Hilton believed Diaz was suffering from "undifferentiated schizophrenia" and "was not competent to stand trial." *Id.* (internal quotation marks omitted).

13. *Diaz*, 630 F.3d at 1318. Diaz informed the court that he did not believe in the court's authority over him and at one point requested that his trial be heard in the "International World Court." *Diaz*, 540 F.3d at 1320.

14. *Diaz*, 540 F.3d at 1319. "Standby counsel" may be appointed by a trial court in order to assist the pro se defendant in his defense. *McKaskle v. Wiggins*, 465 U.S. 168, 170 (1984) (internal quotation marks omitted).

15. U.S. CONST. amend. VI.

16. Diaz refused to sign the required waiver, but because of his oral statements the court allowed his attorney to sign instead. *Diaz*, 540 F.3d at 1320. These oral statements from Diaz included that he did not "wish the jurors to be infringed upon," and when

The district court held a bench trial in which Diaz was found guilty on all five counts and was sentenced to 584 months of imprisonment.¹⁸ Diaz appealed, and the Eleventh Circuit vacated Diaz's convictions and remanded for further proceedings after determining that Diaz did not knowingly waive his right to a jury trial.¹⁹

In May 2009, the district court held Diaz's second competency hearing. This time he was found incompetent to stand trial and was committed to the custody of the U.S. Attorney General for a maximum of four months to determine whether competency to stand trial could be attained. Four business days later, Diaz received notice of a Due Process Involuntary Medication Hearing scheduled for June 3, 2009. At the hearing, Dr. Carlos Tomelleri concluded that he could not approve involuntary medication for Diaz because he was not likely to cause harm to himself or others.²⁰ Dr. Tomelleri did, however, believe that medication would have a "substantial probability" of rendering Diaz legally competent.²¹

Following the Due Process Involuntary Medication Hearing, the district court held a hearing pursuant to the decision in *Sell v. United States*²² on September 8, 2009, concerning involuntary medication for the sole purpose of attaining trial competency of a nondangerous defendant.²³ At the hearing, Diaz was found to suffer from schizophrenia and, in light of testimony, government evidence, and assessment of the *Sell* factors,²⁴ the district court directed the Springfield Medical Center

pressed as to whether he wanted a jury his answer was, "I can have a jury. I can have a jury. I mean you want me to choose . . . to be prosecuted?" *Id.* at 1321 (alteration in original) (internal quotation marks omitted).

17. *Id.* at 1321.

18. *Id.* at 1323.

19. *Diaz*, 630 F.3d at 1318.

20. *Id.* at 1318-19.

21. *Id.* at 1319 (internal quotation marks omitted).

22. 539 U.S. 166 (2003).

23. *Diaz*, 630 F.3d at 1319. The guidelines set forth in *Sell* require the government to meet four criteria by clear and convincing evidence in order to involuntarily medicate a defendant for the purposes of attaining trial competency. *Id.* at 1329. Under *Sell*, only "essential or overriding" state interests may permit the government to involuntarily medicate an incompetent defendant to attain trial competency. *Id.* at 1331 (quoting *Sell*, 539 U.S. at 178-79).

24. In order to involuntarily medicate an incompetent defendant for the sole purpose of attaining trial competency, all four *Sell* factors must be found by the court: (1) important government interests are at stake; (2) forced medication will significantly further the government interests—that is, the medication is substantially likely to render the defendant competent and substantially unlikely to interfere with the defendant's ability to assist counsel; (3) involuntary medication is necessary to further the state interests and alternative treatments are unlikely to reach comparable results; and (4) administering the

to “first seek[] to obtain Mr. Diaz’s voluntary participation” and then, if he refused to cooperate, to forcibly medicate him.²⁵ The district court found that there were no alternatives to medication to restore competency, Diaz’s crimes were serious and of important interest to the government, and Diaz was unlikely to cooperate in any other manner.²⁶

Between all hearings and court appearances, Diaz spent time in various government medical facilities. While at these facilities, Diaz refused to participate in group activities, clinical testing, psychological interviews, or questioning by doctors. He also refused to take any medications regardless of doctor recommendation.²⁷

Diaz appealed the involuntary medication order, contending that the government did not meet the clear and convincing evidence standard regarding the second and third *Sell* factors.²⁸ Diaz filed a motion to stay the order pending the appeal, and the motion was granted.²⁹ The Eleventh Circuit affirmed the district court’s decision to involuntarily medicate Diaz for the sole purpose of attaining trial competency.³⁰

III. LEGAL BACKGROUND

The right to privacy and personal liberty are heavily cherished by the citizens of the United States, as well as historically guarded by the United States Supreme Court. Within the medical arena, individuals are constitutionally granted, through the Fifth and Fourteenth amendments,³¹ the right to choose their personal course of medical treatment with minimal limitation or government interference.³² Citizens also have the right to be fully aware of all risks involved with their medical treatment through the doctrine of informed consent.³³

drugs is medically appropriate. *Sell*, 539 U.S. at 180-81.

25. *Diaz*, 630 F.3d at 1330 (internal quotation marks omitted).

26. *Id.* at 1329-30.

27. *Id.* at 1317-20.

28. *Id.* at 1331.

29. *Id.* at 1330.

30. *Id.* at 1335-36.

31. U.S. CONST. amends. V, XIV.

32. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (holding that a law or provision of a law is invalid if it creates an undue burden on the individual—that is, if the law’s purpose or effect is to place substantial obstacles in the path of a woman’s right to choose an abortion before the fetus attains viability, then the law is unconstitutional); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (noting that competent individuals have “a constitutionally protected liberty interest in refusing unwanted medical treatment”).

33. *Planned Parenthood*, 505 U.S. at 882. Informed consent includes explaining truthful information about the nature of the procedure and all potential health risks to the patient. *Id.*

A. Early Interpretation of Involuntary Medication

Complex situations, such as the due process rights afforded to patients of state mental institutions and the use of psychotropic drugs, complicate inherent rights to privacy and individual liberty in personal medical decisions.³⁴ In 1980, the United States District Court for the Northern District of Ohio recognized, in *Davis v. Hubbard*,³⁵ that a state mental institution does not retain the unlimited power to involuntarily medicate a confined person using psychotropic drugs unless the patient is found to pose a danger to himself or others.³⁶ In *Davis*, a patient brought suit after he was restrained and forcibly given psychotropic medication.³⁷ The district court recognized the right to refuse medication as a fundamental liberty under the Fourteenth Amendment.³⁸ The court held that involuntary medication constitutes a “significant encroachment” on individual liberty, reasoning that the Constitution will tolerate only those limits that afford the required procedural due process in accord with the Fourteenth Amendment.³⁹ The court did not acknowledge the medical obligations of the state to treat its patients, the safety of medical personnel, or any other state interest, including the interest in caring for its citizens, as justified reasons to force medication.⁴⁰ However, the court noted an exception where the patient could be involuntarily medicated with psychotropic medication if he posed a danger to himself or others.⁴¹ Danger does not include a “remote possibility” of danger but requires the actual existence of sufficiently grave and imminent danger to permit forced medication.⁴² Because the personal liberty in deciding the course of one’s medical treatment is so strongly guarded, the standard for any exception to this rule must be extremely high.⁴³

Even more vague is the level of privacy and liberty protection afforded to pretrial detainees and convicts. Broadly, the Supreme Court has held

34. Psychotropic medications, or psychotherapeutic medications, are psychiatric medications used to treat mental disorders. NAT’L INST. OF MENTAL HEALTH, MENTAL HEALTH MEDICATIONS 1 (Rev. 2008). Psychotropic medications are used to treat symptoms rather than cure mental illness. *Id.*

35. 506 F. Supp. 915 (N.D. Ohio 1980).

36. *Id.* at 938.

37. *Id.* at 934.

38. *Id.* at 929.

39. *Id.* at 936.

40. *Id.* at 938.

41. *Id.*

42. *Id.* at 934-35.

43. *Id.* at 934.

that “convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison . . . and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law.”⁴⁴ Therefore, lower courts are able to further determine which rights in relation to involuntary medication shall be awarded to pretrial detainees and those convicted.

In 1984 the United States Court of Appeals for the Tenth Circuit held, in *Bee v. Greaves*,⁴⁵ that pretrial detainees retain the constitutional liberty interest of avoiding unwanted antipsychotic medications.⁴⁶ While this right was not considered absolute, the Tenth Circuit opted to balance the state interests and the demands of organized society in favor of the constitutionally-provided liberty interests of the detainee.⁴⁷ When the defendant, Daniel Howard Bee, was awaiting trial, he began having hallucinations and was moved to a state mental health facility. While in the facility, he was prescribed and voluntarily ingested antipsychotic medications for his schizophrenia. During this time, he was found competent to stand trial. Bee soon complained about the side effects of the medication, which the facility acknowledged, and he refused to take the pills for a period of five days. When the lead physician noted that Bee was beginning to show signs of schizophrenia again, he ordered the staff to restrain and forcibly inject Bee with medication; the physician threatened to do so until Bee cooperated and resumed taking the medication orally. Bee later brought suit to determine whether the state and the facility infringed upon his rights by forcibly medicating him.⁴⁸

In *Bee*, the Tenth Circuit recognized the fundamental liberty interest in the right to privacy and the right to avoid unwanted medical treatment.⁴⁹ However, because Bee was in state custody awaiting trial, the court acknowledged the state interests involved.⁵⁰ Using reasoning similar to the court in *Davis*, the Tenth Circuit held that the state had no duty to treat detainees’ mental issues unless treatment was desired and that the facility had no duty to attain or maintain the detainees’ competency to stand trial without any type of court instruction.⁵¹ The

44. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

45. 744 F.2d 1387 (10th Cir. 1984).

46. *Id.* at 1394.

47. *Id.*

48. *Id.* at 1389-90.

49. *Id.* at 1394.

50. *Id.*

51. *Id.* at 1395.

state's interest in maintaining Bee's competency was not sufficiently legitimate to override the constitutional right of the detainee to refuse treatment.⁵² The only exception noted in *Bee* is that of emergency; in an emergency situation, if medication is the least drastic alternative, the state may have a legitimate interest in the needs of the detainee and those in his presence to involuntarily administer antipsychotic drugs.⁵³

B. The United States Supreme Court and the Evolution of Involuntary Medication

While lower courts evaluated and recognized the due process protection afforded to those fundamental liberties retained by all and the various exceptions limiting those rights,⁵⁴ the United States Supreme Court remained silent concerning the specific issue of involuntary medication of convicted prisoners and pre-trial detainees until its 1990 decision in *Washington v. Harper*.⁵⁵ In *Harper*, a mentally ill prison inmate claimed that the state violated his Fourteenth Amendment due process rights by administering antipsychotic drugs against his will.⁵⁶ The Court acknowledged the importance of the liberty interests protected by the Constitution, as did lower courts deciding on similar issues, which are retained by all citizens, including prisoners.⁵⁷ The sensitive issue of prison environments led the Court to ultimately hold that "the Due Process Clause permits the [s]tate to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."⁵⁸

Therefore, for the first time, the Court determined that prisoners' due process rights extend to rejecting medication and that the state maintains the right to involuntarily medicate with appropriate medication only where the inmate poses a danger to himself or others.⁵⁹ Accordingly, situations involving involuntarily medicating mentally ill inmates require a balance of the inmate's liberty interests in refusing the drug and the state's interest in appropriately medicating the inmate,

52. *Id.*

53. *Id.*

54. *See, e.g., id.* at 1394.

55. 494 U.S. 210 (1990).

56. *Id.* at 213.

57. *Id.*

58. *Id.* at 227.

59. *Id.*

while also protecting the individual inmate and those around him from potential danger.⁶⁰

Two years later, the involuntary medication analysis was refined by the Court in *Riggins v. Nevada*.⁶¹ In *Riggins*, a schizophrenic, convicted of murder and sentenced to death, appealed his conviction by arguing that his conviction was unfairly biased due to being involuntarily medicated while in state custody.⁶² *Riggins* asserted that his insanity defense failed because, as a result of being forcibly medicated, the jury was unable to see his true personality.⁶³ The Court held that, to administer antipsychotic drugs against the defendant's will, the state must first show that no less intrusive alternatives existed, the medication was appropriate for his condition, and the medication was essential for the safety of the defendant and others.⁶⁴ In contrast to the opinion in *Harper*, the Court in *Riggins* evaluated the rights of a convicted felon as opposed to a pretrial detainee.⁶⁵ While the Court relied on the principles first analyzed in *Harper*, the *Riggins* decision raised the level of scrutiny applied in the context of the Fourteenth Amendment and its application to pre-trial detainees.⁶⁶ Furthermore, the Court's opinion in *Riggins* required the state's consideration of less intrusive alternatives to forced medication to further protect the detained individual's rights.⁶⁷

Most recently, in *Sell v. United States*,⁶⁸ the Court addressed the involuntary use of antipsychotic medications to render nondangerous defendants competent to stand trial and its constitutional impact on a defendant's liberty to refuse such treatment.⁶⁹ The opinion in *Sell* established a standard that allows the state to involuntarily medicate a defendant for the sole purpose of attaining trial competency.⁷⁰ The Court set out the standard in four factors. First, the government must have an *important* interest at stake.⁷¹ This factor is evaluated by reviewing the seriousness of the crime, the government's need for public

60. *Id.* at 236.

61. 504 U.S. 127 (1992).

62. *Id.* at 129.

63. *Id.* at 131.

64. *Id.* at 135.

65. *Id.* at 157 (Thomas, J., dissenting) (noting the Court's departure from *Harper*).

66. *Id.* at 156.

67. *Id.* at 135 (majority opinion).

68. 539 U.S. 166 (2003).

69. *Id.* at 177.

70. *Id.* at 180.

71. *Id.*

security, and the defendant's right to a fair trial.⁷² Second, involuntary medication must *significantly further* the state interests.⁷³ The medication must be substantially likely to cause the defendant to attain trial competency, as well as substantially unlikely to have side effects that would render the defendant unable to assist in his own counsel.⁷⁴ Third, the involuntary medication must be *necessary* to further state interests.⁷⁵ This also requires that less intrusive alternatives to forced medication are unlikely to reach the same result or would be wholly ineffective.⁷⁶ Fourth, the medication used must be "*medically appropriate, i.e., in the patient's best medical interest in light of his medical condition.*"⁷⁷

The requirements established in *Sell* are only evaluated when the government seeks to involuntarily medicate a nondangerous defendant for the sole purpose of attaining competency to stand trial.⁷⁸ If involuntary medication is warranted for any other reason, such as the defendant's dangerousness to himself and others, it is unnecessary to determine whether the *Sell* factors are met and irrelevant to determine whether attaining competency is a legitimate interest of the state.⁷⁹

Since the *Sell* decision in 2003, the Supreme Court has not granted certiorari in any *Sell*-related case. Various courts have applied the Supreme Court standard and have more narrowly, however not uniformly, construed the details of each factor.⁸⁰ For example, the United States Court of Appeals for the Third Circuit did not rely on statistical data concerning restoration while conducting a *Sell* hearing; rather, based on evidence that the defendant had previously been restored to trial competency with the administration of medication, the court determined that medication was substantially likely to have the same effect in the future.⁸¹ The Tenth Circuit made special note in its analysis of the rare and limited circumstances the Supreme Court spoke

72. *Id.* For example, if a defendant refuses to take medication, his institutional confinement may be extended, and he would present less of a threat to the security of the public. *Id.*

73. *Id.* at 181.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 181-82.

79. *Id.*

80. *See, e.g.,* United States v. Grape, 549 F.3d 591, 604-05 (3d Cir. 2008); United States v. Valenzuela-Puentes, 479 F.3d 1220, 1223 (10th Cir. 2007); United States v. Rivera-Guerrero, 426 F.3d 1130, 1140 (9th Cir. 2005) (quoting *Sell*, 529 U.S. at 181).

81. *Grape*, 549 F.3d at 604-05.

of in *Sell* when discussing the frequency of involuntarily medicating nondangerous, incompetent individuals.⁸² Heeding the warning against over-application, the Tenth Circuit remanded, instructing the district court to consider the defendant's extremely low level of intelligence in determining the likelihood of competency restoration.⁸³

In *United States v. Rivera-Guerrero*,⁸⁴ the United States Court of Appeals for the Ninth Circuit noted that the court was required to consider the specific medication, the medication's unique side effects, and the medical appropriateness when conducting a *Sell* hearing.⁸⁵ The court focused on the specificities of the medication, not the specificities of the individual defendant.⁸⁶ At the same time, however, the Ninth Circuit stressed the disfavor of *Sell* orders because of the importance of protecting individual liberty interests as well as the powerful impact of antipsychotic medications.⁸⁷

Issues have also been addressed concerning procedural aspects of conducting *Sell* hearings, such as in *United States v. Algere*.⁸⁸ The United States District Court for the Eastern District of Louisiana clarified by ruling that when a judge is present for a *Sell* hearing, whether physically or via video teleconference, the defendant's constitutional right to judicial presence is not violated.⁸⁹ While this court and others have clarified and construed some issues regarding *Sell* hearings, uniformity among districts and circuits does not exist, and the Supreme Court has yet to further define the requirements of the *Sell* test.

IV. THE COURT'S RATIONALE

In an effort to establish the burden required for involuntarily medicating an incompetent defendant for the sole purpose of attaining trial competency, the Eleventh Circuit evaluated this case of first impression and determined that the government met its burden of clear and convincing evidence, affirming the district court's decision to

82. *Valenzuela-Puentes*, 479 F.3d at 1223 (quoting *Sell*, 539 U.S. at 169, 180).

83. *Id.* at 1229.

84. 426 F.3d 1130 (9th Cir. 2005).

85. *Id.* at 1140.

86. *Id.*

87. *Id.* at 1337-38.

88. 457 F. Supp. 2d 695 (E.D. La. 2005).

89. *Id.* at 701.

involuntarily medicate Michael Diaz.⁹⁰ The United States Supreme Court denied certiorari on October 3, 2011.⁹¹

For the first time since the Supreme Court decided *Sell v. United States*,⁹² the Eleventh Circuit was required to determine whether the government met its burden regarding the second and third *Sell* factors.⁹³ The issue for the Eleventh Circuit in *United States v. Diaz*⁹⁴ was whether the state could involuntarily medicate Diaz for the sole purpose of attaining trial competency.⁹⁵ Following decisions from other circuits,⁹⁶ the court of appeals reviewed the *Sell* factors in question under a clear error standard of review.⁹⁷ Also based on decisions from other circuits, the court of appeals concluded that the government's burden of proof is that of clear and convincing evidence.⁹⁸

A. *The Second Sell Factor*

The second *Sell* factor required the court to determine whether involuntarily medicating a detainee to attain competency would "significantly further the government's interest."⁹⁹ This required the court to consider whether forced medication was substantially likely to render the defendant, Diaz, competent, and whether the medication was substantially unlikely to cause side effects that would interfere with Diaz's ability to assist in his own counsel.¹⁰⁰

At Diaz's hearing to determine if the *Sell* factors had been met, two medical experts who personally analyzed Diaz testified that, with appropriate medication, they believed Diaz's chance to be restored to competency ranged between 60% and 70%, or 40% and 90%.¹⁰¹ The

90. *United States v. Diaz*, 630 F.3d 1314, 1335-36 (11th Cir. 2011).

91. *Diaz v. United States*, 132 S. Ct. 128 (2011).

92. 539 U.S. 166 (2003).

93. *See Diaz*, 630 F.3d at 1331.

94. 630 F.3d 1314 (11th Cir. 2011).

95. *Id.* at 1317.

96. *Id.* at 1330-31. The Court of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and now Eleventh Circuits have held that the first *Sell* factor is reviewed de novo, while the second, third, and fourth are reviewed under a clear error standard of review. *See id.* The Tenth Circuit has held that the first two *Sell* factors are reviewed de novo, and the third and fourth are reviewed for clear error. *Id.* at 1331 (citing *United States v. Bradley*, 417 F.3d 1107, 1113-14 (10th Cir. 2005)).

97. *Id.*

98. *Id.* at 1331. Neither the Supreme Court nor the Eleventh Circuit had previously addressed the burden of proof to be used in cases arising under *Sell*; however, other circuits unanimously applied the burden of clear and convincing evidence. *See id.* at 1330-31.

99. *Id.* at 1332.

100. *Id.* (quoting *Sell*, 539 U.S. at 181).

101. *Id.* at 1320-22.

testimony, therefore, indicated the possibility of a 60% chance of being *unable* to attain competency.¹⁰² These results were based on various statistical studies of incompetent patients treated with antipsychotic medication.¹⁰³ The medical experts testified that these results were what they considered a substantial likelihood of rendering competence, and the district court agreed.¹⁰⁴

On appeal, Diaz contended that competency restoration rates were actually only between 40% and 70%, based in part on the expert testimony and medical data, and, according to related judicial decisions,¹⁰⁵ did not meet the burden of a substantial likelihood of restoring competency to stand trial.¹⁰⁶ The Eleventh Circuit found no error in the district court's decision as to the second *Sell* factor.¹⁰⁷ The court explained that the low rates Diaz argued as his likelihood to reach competency to stand trial were actually success rates in restoring patients to a level of stable remission.¹⁰⁸ Stable remission, the court noted, was not the goal of involuntarily medicating an incompetent defendant.¹⁰⁹ The goal, rather, was to merely attain trial competency, which experts and medical data determined was easier to attain than stable remission.¹¹⁰ Notably, it was opined at an early competency hearing that Diaz's IQ¹¹¹ was 79, but this fact was never analyzed

102. *Id.* at 1322.

103. *Id.*

104. *Id.* at 1332-33.

105. A predicted 70% success rate is generally considered substantially likely. *Id.* at 1332 (citing *United States v. Nicklas*, 623 F.3d 1175, 1180 (8th Cir. 2010); *United States v. Gomes*, 387 F.3d 157, 161-62 (2d Cir. 2004)). However, a prediction of a 5-10% success rate is not considered substantially likely. *Id.* at 1333 (citing *United States v. Ghane*, 392 F.3d 317, 319-20 (8th Cir. 2004)).

106. *Id.* at 1332-33.

107. *Id.* at 1332.

108. *Id.* at 1333.

109. *See id.*

110. *See id.*

111. IQ, or intelligence quotient, determines a person's general intellectual functioning. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (Michael B. First ed., 4th ed., text rev. 2000). IQ is determined by standardized, individualized intelligence tests. *Id.* Generally, those with IQ's from 50-55 to approximately 70 suffer from mild mental retardation. *Id.* at 42. Depending on the test administered, there is generally a 5 point measurement error in IQ tests, meaning an IQ assessment of 70 is considered to represent a range of 65-75. *Id.* at 41-42. Therefore, with accompanying adaptive behavioral deficits a person with an IQ of 75 could be deemed mentally retarded. *Id.* Such behavioral deficits must exist in at least two skill areas, which include the following: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Id.* at 41.

further in assessing whether or not he personally had a substantial likelihood of competency restoration.¹¹² Therefore, the Eleventh Circuit held that the district court did not err in finding Diaz's 60-87% chance of successfully being restored to trial competency substantially likely.¹¹³

Diaz also contended that the government failed to prove by clear and convincing evidence that his medical treatment was substantially unlikely to cause side effects.¹¹⁴ The government recognized the potential side effects of the medication they intended to use and also presented alternative plans if Diaz displayed those side effects.¹¹⁵ However, pursuant to *Sell*, most effects should not be at issue.¹¹⁶ Rather, the side effects that should be analyzed by the court are those that could prevent Diaz from being able to assist in his own defense, which would render his trial unfair.¹¹⁷ The Eleventh Circuit held that there was no error in the district court's determination that the government met its burden regarding the second *Sell* factor because Diaz would be given a medication that he could not prove was likely to cause severe side effects, he would be closely monitored by the facility for harmful side effects, and the potential side effects were substantially unlikely to prevent Diaz from assisting in his own defense.¹¹⁸ Therefore, according to the Eleventh Circuit, there was no error in the district court's determination that the government met its burden as to the second *Sell* factor.¹¹⁹

B. *The Third Sell Factor*

The third *Sell* factor addresses whether involuntarily medicating an incompetent defendant is "necessary to further the government's interests."¹²⁰ The court in *Diaz* was required to analyze whether alternative, less intrusive treatments were unlikely to reach the same result as forced medication.¹²¹ Further, the Eleventh Circuit considered whether "less intrusive means for administering the drugs, such as

112. See *United States v. Diaz*, 540 F.3d 1316, 1318 (11th Cir. 2008).

113. *Diaz*, 630 F.3d at 1332-33.

114. *Id.* at 1333.

115. *Id.*

116. *Id.* (citing *Sell*, 539 U.S. at 185-86).

117. *Id.* (citing *Sell*, 539 U.S. at 185-86).

118. *Id.* at 1333-34.

119. *Id.* at 1332-33.

120. *Id.* at 1334; *Sell*, 539 U.S. at 181.

121. *Diaz*, 630 F.3d at 1334-35 (quoting *Sell*, 539 U.S. at 181).

a court order backed by the power of contempt” were available options prior to implementing intrusive, forced methods of medication.¹²²

Diaz contended that the government did not meet the burden of clear and convincing evidence as to the third *Sell* factor because of the state’s expeditious attempts to medicate him involuntarily.¹²³ Diaz argued that a “less-intrusive alternative of convincing him to take his medication” was the appropriate procedure to follow.¹²⁴ Diaz asserted that, in accordance with the Supreme Court’s decision in *Sell*, alternatives should have first been attempted before involuntary medication. Such alternatives, according to Diaz, included building a stable relationship between Diaz and his therapist and having medical staff attempt to convince him to voluntarily take medication.¹²⁵ While the court of appeals recognized the minimal effort made by the state in pursuing alternatives during the period of time between the due process hearing and *Sell* hearings, the court rested its decision on Diaz’s long-term behavior.¹²⁶

The Eleventh Circuit traced Diaz’s rebellious behavior back to July 2008.¹²⁷ Upon his initial admission to a state medical center, Diaz refused to take doctor-recommended medication and would not participate in any programs the facility offered. Six months later, he refused a doctor’s attempts to interact with him through interviews, psychological tests, and questioning about his background. Furthermore, in preparation for his *Sell* hearing, Diaz refused to cooperate with all doctors in interviews and stated that he did not believe in medication.¹²⁸

Experts testified that psychotherapy¹²⁹ alone would be ineffective in treating Diaz because schizophrenia is caused by a chemical imbalance, which requires medication to treat.¹³⁰ Diaz also made clear throughout his various hearings that he did not acknowledge the authority of any court,¹³¹ so a court order to require his participation would probably not compel his cooperation.¹³² Because Diaz refused to participate in

122. *Id.* at 1335 (quoting *Sell*, 539 U.S. at 181).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1335-36.

127. *Id.* at 1335.

128. *Id.*

129. Psychotherapy includes one-on-one conversations between a patient and a therapist. *Id.*

130. *Id.*

131. *See Diaz*, 540 F.3d at 1320.

132. *Diaz*, 630 F.3d at 1335.

any state attempt to attain competency for an extended period of time, not just when involuntary medication was sought by the state, and because alternatives were deemed ineffective, the court of appeals found no error in the district court's holding that the third *Sell* factor was met by clear and convincing evidence.¹³³

On review, the court of appeals found no error by the district court concerning the two *Sell* factors questioned by Diaz.¹³⁴ The court ultimately interpreted the language in *Sell* to determine that Diaz could be forcibly medicated in an attempt to attain trial competency.¹³⁵ Where the government shows by clear and convincing evidence that an incompetent defendant is substantially likely to be restored to competency, that side effects are unlikely to cause the defendant to be unable to participate in his defense, and that less intrusive alternatives would be ineffective due to the defendant's behavior, the incompetent defendant can be involuntarily medicated.¹³⁶

V. IMPLICATIONS

While forced medication may restore incompetent, nondangerous defendants who otherwise refuse treatment, the current state of the *Sell*¹³⁷ analysis lacks guidance, and the definition of a "substantial likelihood" continues to be ambiguous. Courts that have held *Sell* hearings to date have heeded the concern for over-application of forced medication, but without further instruction, the *Sell* factors alone do not place a strict barrier between the constitutional liberties of the individual and the government interest in attaining trial competency to adequately determine eligibility of involuntary medication. Without a more sophisticated analysis of each individual incompetent defendant, a risk of an inadvertent violation of their constitutionally protected liberties remains present. Other than the first factor of the *Sell* test, which evaluates the seriousness of the crime and the state interest in prosecution, evidence of the remaining *Sell* factors can only be determined and analyzed directly through psychiatric testimony.¹³⁸

The second factor of the *Sell* test, which was one portion of Diaz's appeal, requires expert psychiatric testimony as to whether there is a

133. *Id.* at 1335-36.

134. *Id.* at 1334-35.

135. *Id.* at 1335-36.

136. *Id.*

137. *Sell v. United States*, 539 U.S. 166 (2003).

138. Gregory B. Leong, *Commentary: Restorability of Incompetence to Stand Trial—Implications Beyond Predictive Equations*, 35 J. AM. ACAD. PSYCHIATRY & L. 44, 44 (2007).

substantial likelihood that involuntary medication will restore the defendant's competence without causing side effects that will significantly interfere with the defendant's ability to assist counsel.¹³⁹ The second factor appears to be the least straightforward textually and in reality requires a more thorough analysis and understanding. Given the complexity of the second factor, determining the likelihood of competency restoration, the level of textual ambiguity and lack of medical direction available to judges as well as psychiatrists is surprising.¹⁴⁰ While medication may begin to bridge the gap between an incompetent defendant and trial competency, it is only the beginning. A true determination of the likelihood of restorability requires a personalized analysis of the incompetent individual based on his or her individual characteristics. Medicine may only make certain steps towards trial competency if the individual has personal limitations that medication cannot repair, and *Sell* may allow courts to overlook those individual characteristics that create a gap between medication and trial competency restoration.¹⁴¹

Perplexing as it may be, there is far more information available concerning the less commonly raised issue of "not guilty by reason of insanity" than that available on competency to stand trial.¹⁴² Currently, "defendants hospitalized for competence restoration occupy . . . one ninth of the nation's state psychiatric hospital beds."¹⁴³ Even though competency restoration is common in our criminal justice system, "no jurisdiction has established legal guidelines concerning testimony about potential restoration."¹⁴⁴ Lacking guidelines, uniform requirements, or individually based analysis, courts still "rarely disagree with the opinions of mental health professionals."¹⁴⁵ Even though judges rely so heavily on mental health experts in their determination of competency and the substantial likelihood of restoration, very little

139. *Sell*, 539 U.S. at 181.

140. Leong, *supra* note 138, at 44.

141. See Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 N. ENGL. J. ON CRIM. & CIV. CONFINEMENT 81, 86 (2005). For example, even mildly retarded incompetent defendants generally will not receive all the potential benefits of medication, as opposed to an incompetent defendant with no personal limitation. *Id.*

142. Leong, *supra* note 138, at 46.

143. Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. PSYCHIATRY & L. 34, 34-35 (2007).

144. *Id.* at 35.

145. Karen L. Hubbard, Patricia A. Zapf & Kathleen A. Ronan, *Competency Restoration: An Examination of the Differences Between Defendants Predicted Restorable and Not Restorable to Competency*, 27 LAW & HUM. BEHAV. 127, 128 (2003).

attention is given to an expert's ability to accurately make such a prediction.¹⁴⁶ While courts have not determined the specific requirements of statistics and testimony, some jurisdictions have discussed what constitutes a substantial likelihood of rendering competency.¹⁴⁷ However, there seems to be little uniformity in the opinions. The United States Court of Appeals for the Second Circuit has held that a 70% chance of competence restoration was substantial,¹⁴⁸ while the Tenth Circuit has held that an 80% chance was substantial.¹⁴⁹ The United States Court of Appeals for the Sixth Circuit determined that 76% to 93% was an appropriate range.¹⁵⁰ Notably, the United States District Court for the Southern District of California found a "more likely than not" chance of restoration insubstantial.¹⁵¹

Experts may testify about the results of any study, their experience, any personal characteristics of the particular defendant, or anything else they feel appropriate. There is no uniform requirement as to what information may be considered by the court in its determination of a "substantial likelihood," and therefore, the court may be misled by meaningless percentages. Examiners are generally poor at predicting those defendants who will regain competency and those who will not.¹⁵² No matter what data is available, its applicability to a certain defendant is highly uncertain.¹⁵³ The greatest possible assumption is that similar groups will have similar results, but even if a large portion of the test group was restored to competency with medication, it is still difficult, if not impossible, to accurately predict where any particular incompetent defendant will lie on the response curve.¹⁵⁴ Because of this general group analysis, clinicians over-predict restorability in particular individuals.¹⁵⁵ Without an extremely sophisticated model, which does not yet exist, predicted outcomes for a specific incompetent defendant are nearly impossible to ascertain.¹⁵⁶

146. Robert A. Nicholson et al., *Predicting Treatment Outcome for Incompetent Defendants*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 367, 368 (1994).

147. See, e.g., *United States v. Green*, 532 F.3d 538, 552 (6th Cir. 2008); *United States v. Bradley*, 417 F.3d 1107, 1115 (10th Cir. 2005); *United States v. Gomes*, 387 F.3d 157, 161-62 (2d Cir. 2004); *United States v. Rivera-Morales*, 365 F. Supp. 2d 1139, 1141 (S.D. Cal. 2005).

148. *Gomes*, 387 F.3d at 161-62.

149. *Bradley*, 417 F.3d at 1115.

150. *Green*, 532 F.3d at 552.

151. *Rivera-Morales*, 365 F. Supp. 2d at 1141.

152. Hubbard, *supra* note 145, at 127.

153. *Pinals*, *supra* note 141, at 104-06.

154. *Id.* at 105-06.

155. *Id.* at 105.

156. *Id.* at 105-06.

For example, in Diaz's *Sell* hearing, various doctors testified and gave the court statistics related to the likelihood of his restorability.¹⁵⁷ One physician testified that, in her experience, between 60% and 70% of patients were restored to competency with medication.¹⁵⁸ Another physician testified that, in his experience with cases involving involuntary medication for the purpose of trial competency, between 75% and 80% of individuals medicated reached the level of trial competency.¹⁵⁹ The psychiatrist also summarized several studies that indicated 95%, 87%, 75%, and 77% success rates, respectively, in various cases of psychotic patients and competency restoration.¹⁶⁰ These percentages were all based solely on group outcomes and made no mention of personal characteristics such as age, psychological history, cognitive impairment, intellect, or any other pertinent factors.¹⁶¹ This psychiatrist further testified that, while it was his most pessimistic estimate, there was potentially a 60% chance of Diaz *failing* to attain trial competency.¹⁶² The broad range of statistics provided to the court in *Diaz* lacked any detail that showed that Diaz, as a unique individual, was considered in an involuntary medication analysis. Further, due to the unavailability of Diaz's medical records prior to his charges and the lack of discussion concerning his IQ and other personal characteristics, it seems possible that the court determined a "substantial likelihood" based solely on impersonal data.¹⁶³ Because of the lack of required testimony or evidence, psychiatrists' assertions based on completely impersonal data are admissible and heavily relied upon by the court in making critical *Sell* decisions.¹⁶⁴

Studies such as those in *Diaz* may be a good starting point for the court in its analysis of whether the prosecution has met its burden in showing a substantial likelihood of competence restoration. However, studies alone are too likely to lack consideration of other possible characteristics that must be overcome to bridge the gap between medically-induced improvements and restored trial competency. It must be remembered that not all incompetent defendants are alike. Judges tend to place great faith and reliance on the testimony of psychiatrists

157. United States v. Diaz, 630 F.2d 1314, 1320-22 (11th Cir. 2011).

158. *Id.* at 1320.

159. *Id.* at 1321.

160. *Id.* at 1322.

161. *See id.* at 1321-22.

162. *Id.* at 1322.

163. *See id.* at 1332-34. Conclusions were based on statistical studies of groups of incompetent patients with varying disorders, medical histories, personal characteristics, and medical treatment avenues. *See id.*

164. Nicholson, *supra* note 146, at 368.

for *Sell* purposes,¹⁶⁵ and further, clinicians tend to over-predict restorability.¹⁶⁶ One state study found that “clinicians were wrong in predicting treatment outcomes of 85 percent of the defendants who ultimately were not restored.”¹⁶⁷ Noting these faults, researchers and psychiatrists seem to be looking for answers. For example, Dr. Douglas Mossman completed a successful study by creating a complex equation that considered demographic and diagnostic variables,¹⁶⁸ resulting in a personalized determination of the likelihood of attaining trial competency.¹⁶⁹ Other studies showed differences between those restored to trial competency and those not restored after medication—the differences being nonpsychiatric variables.¹⁷⁰ At present, there are few reliable findings that even address the issue of accuracy in predictions of who will successfully be restored to trial competency.¹⁷¹

Forced medication may fully restore Michael Diaz and many other incompetent defendants who otherwise would refuse treatment to the level of trial competency. However, the “substantial likelihood” of competence restorability standard is currently ambiguous and appears to generally be measured and explained to the court based on impersonal statistics. Psychiatrists have noted the lack of practical guidelines available to them in determining the likelihood of competence restoration and some have made steps to narrow these gap.

In the meantime, however, courts are left to analyze statistics with questionable value to determine whether the state has met its burden of proving a substantial likelihood of trial competence restoration. Until a reliable measurement tool is created or the Supreme Court further construes the *Sell* test to remove the ambiguity, a dangerous potential exists for the unacknowledged gaps between incompetence, medically-induced improvement, and trial competency to remain unbridged. Under the current methodology, every incompetent defendant is at risk of an arbitrary violation of his or her constitutionally protected liberty interests.

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165. *Id.*

166. *Pinals, supra* note 141, at 105.

167. *Mossman, supra* note 143, at 35.

168. *Id.* at 38. Variables included charge, age at admission, mental retardation, having schizophrenia or schizoaffective disorder, number of previous hospitalizations, cumulative previous hospitalizations, non-African-American ethnicity, and having a substance use disorder, all of which reduced the likelihood of restoration. *Id.*

169. *See id.*

170. *Hubbard, supra* note 145, at 127.

171. *Pinals, supra* note 141, at 105.

