

No. 19-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

JEAN-PAUL GAMARRA,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

A.J. KRAMER
FEDERAL PUBLIC DEFENDER
LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
(Counsel of Record)
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner

QUESTION PRESENTED

In Sell v. United States, 539 U.S. 166, 179 (2003), this Court held that “the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.”

This case presents the question whether the Constitution permits the government to satisfy the Sell requirements based on testimony from a prison psychiatrist who did not examine, or make reasonable efforts to examine, the defendant?

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Jean-Paul Gamarra respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The recommendation of the Magistrate Judge (Pet. App. 44a) and the opinion of the district court (Pet. App. 22a) are unreported. The opinion of the D.C. Circuit (Pet. App. 1a) is not yet reported.

JURISDICTION

The D.C. Circuit issued its judgment and opinion (Pet. App. 1a) on October 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the United States Constitution provides: "No person shall . . . be deprived of . . . liberty . . . without due process of law."

With respect to the hospitalization of those found incompetent to stand trial, Congress has provided:

If, after the [competency] hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility-

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.

18 U.S.C. § 4241(d).

STATEMENT OF THE CASE

Mr. Jean-Paul Gamarra was arrested on March 28, 2017, after approaching a U.S. Secret Service officer near the White House. As established at the preliminary hearing, Mr. Gamarra told the officer that he had a very important package he needed to provide

to the Secret Service. He was holding a U.S. Postal Service priority mail envelope which he said contained a component for a nuclear device. He made clear that the package was not an explosive and that he did not wish to do harm to the President. Writing on the envelope said in part, "Warning this is a [] threat on the President and Senator life" and "Secure Keyboard to be Reverse Engineered." After Mr. Gamarra's arrest, and the clearing of the area, the package was revealed to contain an ordinary Bluetooth keyboard. Mr. Gamarra told officers that it could be used as a detonator and that he had brought it to the Secret Service so that the Secret Service could "reengineer it to make it safe."

On April 4, 2017, Mr. Gamarra was indicted in the federal district court for the District of Columbia for Threats Against the President, 18 U.S.C. § 871, and Threats and Conveying False Information Concerning Use of an Explosive, 18 U.S.C. § 844(e).

That same day, Mr. Gamarra was committed for a competency evaluation. A forensic psychologist concluded that he suffered from a 'schizoaffective disorder' and that he was not competent to stand trial. On July 17, 2017, the Magistrate Judge found Mr. Gamarra not competent and issued an order under 18 U.S.C. § 4241(d) committing him to custody "for a period of 120 days" to determine whether there was a substantial probability that competency would be restored in the foreseeable future.

Due to errors and delays, Mr. Gamarra did not arrive for his evaluation at the Federal Medical Center Butner ("Butner") until two months later, on September 19, 2017. It was not until February 9, 2018, that the Magistrate Judge received a forensic evaluation report from Butner. That report, written by Pre-Doctoral Psychology Intern Kelsey Laxton and also signed by Forensic Psychologist Evan DuBois as Supervisor, opined that Mr. Gamarra had "Schizophrenia, Continuous" and that he was unlikely to be restored to competency without adherence to a regimen of psychotropic medication.

On March 8, 2018, the government moved to involuntarily medicate Mr. Gamarra. A hearing pursuant to Sell v. United States, 539 U.S. 166 (2003), was set for April 9, 2018.

On April 3, 2018, the government filed a Motion to Order Physician to Prepare Report and Appear as Directed, in which the government reported that Butner Staff Psychiatrist Dr. Logan Graddy, who would be the medical doctor testifying regarding the Sell medication factors, had informed the prosecutor that he requires a subpoena to testify and would "compile [his report] when ordered by the Court." Graddy had further stated: "I typically ask for three weeks to review documents, complete the report, and route it through the Warden." Thus, despite the pending Sell hearing date of April 9, 2018, the government asked

that Dr. Graddy be ordered to have a report available by April 23, 2018, and to appear by video on April 25, 2018.

On April 6, 2018, the district court ruled that the government had violated § 4241(d) by hospitalizing Mr. Gamarra at Butner well beyond the four-month statutory limit and ordered that the Sell hearing take place before the Magistrate Judge no later than April 30, 2018.

On Saturday April 7, 2018, Mr. Gamarra was transferred from Butner to the Piedmont Regional Jail.

On Monday, April 9, 2018, Butner witnesses Laxton and DuBois were present by video but the Sell hearing had to be continued to Friday April 13, 2018, to give defense counsel time to consult with Mr. Gamarra. When the Magistrate Judge expressed frustration that "we're sitting here today with no report and no Dr. Graddy," the prosecutor reported that Dr. Graddy was "very busy" and requested the court's assistance in "light[ing] a fire" under him by ordering him to be available to testify on Friday, April 13, 2018, and to issue a report "forthwith," which request was denied. (4/9/18:8, 13, 18). Two days later, Dr. Graddy produced a Forensic Addendum and Treatment Plan for Mr. Gamarra dated April 11, 2018.

1. The Sell Hearing.

The Sell hearing began on April 13, 2018. Intern Laxton, qualified as a clinical forensic psychology expert, testified

that she and her supervisor, psychologist DuBois, had discussed with Mr. Gamarra that medication would likely be necessary to get his symptoms under control but that his willingness to adhere to a medication regimen was variable. (4/13/18:26, 37). He consented to try only one antipsychotic (quetiapine), informing Laxton and the pharmacist that he had he "died previously taking [risperidone]." (4/13/18:26-27). DuBois agreed with Laxton's diagnosis and competency conclusions. (4/13/18:63-65). He did not recommend individual therapy in place of antipsychotic medication because efforts by him and Laxton to challenge Mr. Gamarra's delusional beliefs had not been effective. (4/13/18:94-95).

Dr. Logan Graddy, M.D., testified as an expert in forensic psychiatry. Unlike Laxton and DuBois, Dr. Graddy never examined Mr. Gamarra. (4/13/18:114, 135). Indeed, despite Mr. Gamarra having been confined for treatment at Butner for over six months, and despite the fact that, starting at the end of October 2017 (after the retirement of Graddy's colleague Dr. Herbel), Mr. Gamarra "came under my [Graddy's] care" (4/13/18:112-13), Dr. Graddy was not sure he had ever laid eyes on Mr. Gamarra. See 4/13/18:135 ("I may have seen him around. I don't know. I looked at his picture."). Rather, Graddy's "care" of Mr. Gamarra consisted solely of reviewing six clinical encounter notes written by a pharmacist. (4/13/18:112, 138).

Graddy testified that near the end of Mr. Gamarra's term at Butner, when "this matter started []coming to my attention," he was asked to review Mr. Gamarra's chart and give an opinion regarding whether he was a good candidate for medications. (4/13/18:112-13, 124) ("[h]is specific case really did not come to my attention until early April"). Graddy conducted the chart review on April 4, 2018. (4/13/18:113). On April 10, 2108, he began preparing his report dated April 11, 2018. (4/13/18:132-33). That report diagnosed Mr. Gamarra with "schizophrenia, multiple episodes, currently in[an]active episode." (4/13/18:113-14). Unlike Laxton and DuBois, who concluded Mr. Gamarra's schizophrenia was "continuous," Dr. Graddy's review of the records suggested to him that "Mr. Gamarra has gotten better in the past on medications, significantly better, such that I have classified him as having multiple distinct episodes rather than one continuous episode." (4/13/18:115).

Dr. Graddy also provided a document written by himself and Dr. Herbel, entitled "FMC Butner Sell Appendix 2017" that set forth competency restoration rates for antipsychotic medications, including a study showing a 76% restoration rate for schizophrenia. (4/18/18:40-41). Graddy concluded that, while he did not evaluate Mr. Gamarra's competency, "he appears to me to be consistent with other Sell defendants who did regain their competency when treated with antipsychotic medication" and

"appears to me to be a patient who does get better with treatment." "Other treatments are not very effective for these conditions." (4/13/18:116-21).

If involuntary treatment were ordered, Graddy would start Mr. Gamarra on the antipsychotic drug risperidone because "it is a medicine he took in the past" that he "appeared to tolerate . . . well" and that had been documented to "improv[e] . . . his mental state." (4/13/18:123).

He opined that antipsychotic medication would be "medically appropriate" for Mr. Gamarra because he has a mental condition that responds to medication and "I believe that he is suffering due to this disorder." (4/13/18:120, 122). Although antipsychotic medicines have a significant rates of serious side effects -- a 2-10% reaction rate for acute dystonic reactions (muscle contractions), up to 50% for parkinsonism (muscle rigidity, tremors, and decreased facial expressions), up to 32% for dyskinesias (involuntary grimacing, tongue movements, blinking, and limb movement), and up to 30% for akathisia (uncomfortable inner restlessness)-- Graddy expressed confidence that if Mr. Garmarra were forcibly medicated, side effects could be monitored and managed, through dose adjustment, medication change, or side effect medication. (4/13/18:22-25, 31-33, 38-40, 120-23). Despite the risks of serious side effects, Graddy

concluded that "from a medical perspective, benefits of treatment, in my opinion, outweigh the risks." (4/13/18:120).

On August 24, 2018, the Magistrate Judge recommended denial of the government's motion for involuntary medication on the ground that Mr. Gamarra had not been provided "treatment" at Butner and that, where there has been a 120-day hospitalization "for treatment" under § 4241(d), such "treatment" is a predicate to a governmental request for authorization to involuntarily medicate for the purpose of restoring competency. (Pet. App. 44a).

2. The District Court's Sell Ruling.

The district court rejected the Magistrate Judge's recommendation and, on October 19, 2018, issued an opinion allowing the government to forcibly medicate Mr. Gamarra. (Pet. App. 22a). The court concluded that the government had satisfied by clear and convincing evidence the four Sell requirements:

(1) doing so advances an important government interest, such as bringing to trial an individual accused of a serious crime;

(2) the medication is substantially likely to render defendant competent to stand trial[] and substantially unlikely to have side effects that will interfere significantly with defendant's ability to assist counsel in conducting a trial defense;

(3) alternative less intrusive treatments are unlikely to achieve substantially the same result; and

(4) administration of the medication is medically appropriate, *i.e.*, in the patient's best interest in light of his medical condition.

Pet. App. 29a-30a (quoting United States v. Dillon, 943 F. Supp.2d 30, 34-35 (D.D.C. 2013) (citing Sell, 539 U.S. at 180-82), aff'd, 738 F.3d 284 (D.C. Cir. 2013)).

As to the first factor, the district court concluded that the "special circumstance" of Mr. Gamarra's lengthy pre-trial detention in relation to his likely sentence -- the court acknowledged that 34 months could pass between Mr. Gamarra's arrest and the start of trial and that his apparent guideline range was only 21-27 months -- was outweighed by the benefits of prosecution. (Pet. App. 30a-36a).

For the second factor, the court relied on Dr. Graddy's testimony about restoration rates and side effects, concluding that Mr. Gamarra "is likely to have his competency restored" and that side effects can be monitored and managed. (Pet. App. 36a-38a).

The court found the third factor met based on the testimony from all three witnesses that less intrusive treatments are unlikely to work. (Pet. App. 38a-40a).

As to the last factor -- whether administration of the medication is "in the patient's best medical interest in light of his medical condition" -- the district court relied entirely on Dr. Graddy:

Overall, the Court finds that Dr. Graddy's conclusion that involuntary medication is medically appropriate is persuasive, especially since the record demonstrates that Gamarra has been treated with antipsychotic

medications, including risperidone, on several past occasions in a clinical setting and that these medications have significantly improved Gamarra's condition.

(Pet. App. 40a-42a).

On October 31, 2018, the district court stayed it's forcible medication order pending this interlocutory appeal.

THE D.C. CIRCUIT'S RULING

On appeal, Mr. Gamarra challenged the sufficiency of the evidence on the second and fourth Sell factors -- involving the likely side effects of the proposed medication and its medical appropriateness for Mr. Gamarra -- where those medication factors could only be satisfied by a medical doctor and the only medical doctor to testify (Dr. Graddy) had failed to examine Mr. Gamarra or take a medical history from him.

Mr. Gamarra contended that Dr. Graddy's testimony was not sufficiently reliable to support clear and convincing evidence findings on the medication issues where Graddy admitted that the records review procedure he followed in this case was highly unusual and "unfortunate," and required him to "limit" his opinion about competency restoration and "be careful" with respect to medical appropriateness. Of the 16 Sell evaluations Graddy had conducted, this was the only one where he had not examined the human being who was the subject of the evaluation. (4/13/18:111, 114-16, 120).

Although Dr. Graddy attempted to justify his failure by saying, "[j]ust the timing of this situation was such that I did not have a chance to meet with him" (4/13/18:114), Mr. Gamarra demonstrated that an examination could have taken place if it had been made a priority. Butner had acknowledged shortly after Mr. Gamarra's arrival that its 120-day evaluation window ended January 16th and Intern Laxton's report was thus dated January 12th. Dr. Graddy was notified on March 20th that a Sell hearing was set for April 9th. When he finally began reviewing Mr. Gamarra's chart on April 4th, Mr. Gamarra was still at Butner. Dr. Graddy could have examined Mr. Gamarra at any time before he departed Butner on April 7th, but chose instead to base his report and testimony solely on a review of medical records.

Mr. Gamarra argued that Dr. Graddy's proposal to administer the drug risperidone could not meet the high Sell burden where it was made without any personal examination of, or taking of medical history from, Mr. Gamarra, and where it failed to account for certain information in the medical records on which it was purportedly based. Specifically, those records contained 1) Mr. Gamarra's repeatedly expressed aversion to risperidone in particular; 2) documentation of a serious blood-pressure reaction to that drug; and 3) Mr. Gamarra's prior report while on risperidone of a parkinsonian-type neuromuscular side effect,

which report Dr. Graddy discredited based on reasoning inconsistent with his own medical testimony.

The D.C. Circuit rejected Mr. Gamarra's challenge to the Sell medication factors, reasoning that "courts have relied on experts who reached their opinions based on a review of a patient's medical records and other information without personally conducting an examination." Pet. App. 5a (citing Jones v. Sec'y, Fla. Dept't of Corr., 834 F.3d 1299, 1315-16 (11th Cir. 2016) (collecting cases)).

As the district court noted, an opinion of the American Psychiatric Association's Ethics Committee then in effect concluded that it was both ethical and common for a "'forensic expert to offer opinions' based on review of records and without examining the defendant in person."

Pet. App. 5a (quoting Pet. App. 41a-42a (quoting American Psychiatric Ass'n, Opinions of the Ethics Committee on The Principles of Medical Ethics 35 (2017), available at <https://www.psychiatry.org/psychiatrists/practice/ethics>)).¹ The Court acknowledged that "[t]he government's burden here was higher than under the common preponderance of evidence standard," but declined to find this of significance in the absence of "countervailing authority connecting the lack of personal examination with a failure to meet that burden." (Pet. App. 5a).

¹ The 2017 Opinions document quoted by the district court is no longer on-line, having been replaced by Opinions dated 2019.

Judge Pillard wrote a concurring opinion emphasizing the serious liberty interests at stake in Sell cases and that the government “must exercise exacting diligence to meet its burden.” (Pet. App. 9a). Among other concerns, Judge Pillard found it “remarkabl[e]” that “no psychiatrist had seen Gamarra in person . . . during the time from September 2017 to April 2018,” noting:

Whatever the situation when Dr. Graddy testified, it appears that current ethical guidelines would not support testimony by a psychiatrist who did not make reasonable efforts to examine the patient in person. See American Psychiatric Ass’n, Opinions of the Ethics Committee on The Principles of Medical Ethics 25 (2019), available at <https://www.psychiatry.org/psychiatrists/practice/ethics>.

(Pet. App. 14 n.1). Judge Pillard also questioned “how a court could make the medically informed determinations that the second and fourth Sell factors demand” given the “level of generality” with which Dr. Graddy’s treatment plan was sketched. (Pet. App. 17a). Noting Mr. Gamarra’s aversion to risperidone in particular and the documentation of a prior blackout from low blood pressure on that drug, Judge Pillard observed that, “Perhaps there are good medical reasons for Dr. Graddy’s choice of risperidone, but those reasons are not apparent from the record.” (Pet. App. 18a-19a). Under the clear error standard, and given that some of Judge Pillard’s concerns were not raised by Mr. Gamarra, Judge Pillard joined in affirming the order for forcible medication, but did so “uneasily.” (Pet. App. 21a).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE GOVERNMENT'S POWER TO FORCIBLY MEDICATE CITIZENS FACING CRIMINAL CHARGES.

This case presents a fundamental question about the circumstances under which the United States of America can be allowed to medicate one of its citizens -- by force -- for the sole purpose of rendering him competent to stand trial.

This Court has held that instances in which the four Sell factors will be satisfied so as to permit involuntary administration of drugs solely for trial competence "may be rare." Sell, 539 U.S. at 180. Because forcing a person to take unwanted psychotropic medication entails a grave deprivation of liberty and autonomy -- a substantial and degrading intrusion of the body and brain -- the government must meet its burden with exacting diligence. Circuit courts considering the government's burden of proof have required the government to prove the four Sell factors by clear and convincing evidence. United States v. Dillon, 738 F.3d 284 (D.C. Cir. 2013) (collecting cases).

The government cannot, consistent with due process, meet its burden under Sell where no medical doctor examines or makes reasonable efforts to examine the defendant. Sell factors two and four require the government to prove the risks and benefits of powerful antipsychotic medications and to prove their "medical appropriateness" for a particular patient. These

are matters that require a physician's professional medical judgment. See American Psychiatric Ass'n, APA Commentary on Ethics in Practice, Topic 3.3.2 (2015), available at <https://www.psychiatry.org/psychiatrists/practice/ethics> (in "split psychotherapy/psychopharmacology treatment," psychiatrists "are still solely responsible for the medical aspects of treatment"). It is for this reason that the government in this case was so desperate to get medical doctor Graddy to write a report and be ready to testify on what it called the "Sell medication factors." Although Mr. Gamarra had met with other Butner staff, those professionals had no prescription-writing authority and lacked the medical expertise to opine on the likely effects on Mr. Gamarra, positive and negative, of different antipsychotic drugs, let alone to say they would prescribe a particular drug for Mr. Gamarra based on its medical appropriateness for him. Dr. Graddy's testimony was essential.

Yet here, because Dr. Graddy had not involved himself in his patient's care during the many months Mr. Gamarra had been committed to Butner for "treatment," and because Dr. Graddy failed to meet with Mr. Gamarra -- even upon learning that a Sell hearing had been scheduled -- Dr. Graddy was forced to base his expert Sell opinions entirely on a review of medical records. To allow the government to forcibly medicate Mr. Gamarra based on

such testimony is inconsistent with the due process concerns underlying the Sell requirements.

The Third Circuit has recognized that while review of medical records can be a reliable method of concluding someone is ill, when it comes to more nuanced medical findings, such as a differential diagnosis, the performance of physical examinations and taking of medical histories "significantly reduce the likelihood of erroneous results." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994) (affirming inadmissibility of proffered expert testimony as to the cause of symptoms in all plaintiffs who were not personally examined or queried as to medical history by the opining physician and affirming summary judgment against those plaintiffs). Although the panel here referenced cases allowing reliance on medical testimony based on review of medical tests or records, those cases involved very different standards of proof than that borne by the government here. Here, while Dr. Graddy's testimony may have qualified for admission under Fed. R. Evid. 703, it could not alone satisfy the government's clear and convincing burden of proof under Sell where he failed to examine the defendant.

Indeed, as noted by Judge Pillard, the American Psychiatric Association's current guidelines do not support testimony by a psychiatrist who did not make reasonable efforts to examine the patient in person. In general, "[p]sychiatric diagnosis occurs

in the context of an evaluation, based on thorough history taking, examination, and, where applicable, collateral information. It is a departure from the methods of the profession to render an opinion without an examination and without conducting an evaluation in accordance with the standards of psychiatric practice.” American Psychiatric Ass’n, Opinions of the Ethics Committee on The Principles of Medical Ethics 62 (2019) (hereinafter “2019 APA Opinions”), available at <https://www.psychiatry.org/psychiatrists/practice/ethics> (emphasis added). For example, before a psychiatrist determines that a person requires involuntary hospitalization, “the psychiatrist must do a proper psychiatric examination to ensure that the person meets the clinical criteria for involuntary hospitalization.” Id. at 27 (emphasis added).

While departures from the examination requirement are permitted in “certain forensic cases and consultive roles,” id. at 62, such exceptions are limited. In response to a question whether it is ethical for a psychiatrist to testify about the competency of a criminal defendant based solely on medical records, the APA Opinions state:

In criminal cases, a personal examination generally is necessary. However, if [afte]r reasonable efforts to perform a personal examination of the criminal defendant are made, a personal examination is not performed, an opinion may be given if the limitations of the exam are stated and the ensuing weakness of the conclusion is acknowledged.

2019 APA Opinions at 25.

Here, Dr. Graddy made no "reasonable efforts" to examine Mr. Gamarra. He testified that "the timing" was such that he "did not have a chance to meet with him." But according to Dr. Graddy, Mr. Gamarra was "under my care" for more than five months. For more than two of those months, the report of the psychologists was complete and Butner was fully aware that the 4-month evaluation window had expired. Even after being notified on March 20, 2018, that his opinion was needed for an April 9th Sell hearing, and even after reviewing Mr. Gamarra's chart on April 4th, Dr. Graddy chose not to meet with his patient. Thus, after more than six months at Butner, Mr. Gamarra was shipped back to the District of Columbia on April 7th without having met the doctor who ultimately testified that a mind-altering anti-psychotic drug -- the very one on which he had experienced side-effects and to which he had expressed particular aversion -- was "medically appropriate" for him.

This Court should grant certiorari in this case to decide the important question whether due process permits the government to involuntarily medicate a criminal defendant under Sell where no medical doctor has examined, or made reasonable efforts to examine, the defendant. Under these circumstances, a psychiatrist in Dr. Graddy's position should not, from an ethical standpoint, offer medical opinions at all. Even where reasonable efforts to examine a defendant have been made, a non-examining

psychiatrist should testify only "if the limitations of the exam are stated and the ensuing weakness of the conclusion is acknowledged." 2019 APA Opinions at 25. Here, Dr. Graddy acknowledged that his opinions had to be "limit[ed]" by his failure to examine Mr. Gamarra. This Court should recognize that, taking into account the "ensuing weakness" of conclusions reached under those circumstances, such conclusions are legally insufficient to meet a clear and convincing standard of proof under Sell.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A.J. KRAMER,
FEDERAL PUBLIC DEFENDER

/s/

LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
(Counsel of Record)
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500

October 23, 2019