

04-1004-cr

To be Argued By:
THOMAS V. DAILY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1004-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

AARON GOMES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. By ruling filed February 17, 2004, the district court ruled that the defendant may be involuntarily treated with antipsychotic medication for the purpose of rendering him competent to stand trial. The defendant filed a timely notice of appeal on February 20, 2004. Under the “collateral order” doctrine, this Court has interlocutory appellate jurisdiction over the district court’s involuntary medication order. *See Sell v. United States*, 539 U.S. 166, 175-77 (2003).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court clearly erred with respect to its factual findings in support of an order authorizing the Bureau of Prisons to involuntarily treat the defendant with antipsychotic medications in order to render him mentally competent to stand trial.

United States Court of Appeals

FOR THE SECOND CIRCUIT Docket No. 04-1004-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

AARON GOMES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Aaron Gomes had a gun in his pocket when he was stopped by the police late one night in a high-crime area of Hartford, Connecticut. Because of his lengthy felony history, he was charged in federal court with unlawful possession of a firearm by a convicted felon, and he faces a term of at least 15 years' imprisonment if he is convicted. His case, however, has not gone to trial. He has a psychotic delusional disorder that has rendered him incompetent to assist in his defense. In light of his refusal to take antipsychotic medications to treat his mental illness, the government sought authorization from the district court to allow medical personnel of the federal

Bureau of Prisons to involuntarily treat him with antipsychotic medications in order to render him competent for trial.

The defendant now appeals from the district court's order granting the government's request. In accordance with the standards recently set forth by the United States Supreme Court in *Sell v. United States*, 539 U.S. 166 (2003), the district court found – by clear and convincing evidence – (1) that important government interests are at stake in bringing the defendant to trial; (2) that the proposed course of treatment with antipsychotic medication is substantially likely to render the defendant competent to stand trial and to enhance his ability to communicate with his attorney; (3) that the risks of adverse side effects are substantially unlikely to interfere with the defendant's ability to assist his counsel at trial; (4) that less intrusive, non-medication alternatives are unlikely to bring the defendant to competence; and (5) that the administration of antipsychotic medications is medically appropriate and in the defendant's best medical interest. Because the defendant has failed to show clear error with respect to any of these findings, the Court should affirm.

STATEMENT OF THE CASE

This appeal arises from an order of the United States District Court for the District of Connecticut (Christopher F. Droney, J.), granting the government's motion seeking authority to involuntarily treat the defendant-appellant, Aaron Gomes, with antipsychotic medication for the purpose of rendering him competent to stand trial.

On October 27, 1998, a federal grand jury in Connecticut indicted the defendant on one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Appendix for the Defendant (“A”) at 16.

On May 6, 1999, the government filed a notice of sentence enhancement advising the district court that, because the defendant has at least three previous convictions of violent felonies or serious drug offenses, the defendant faces a mandatory minimum sentence of 15 years’ imprisonment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). A5.

On June 23, 1999, the district court entered an order for the defendant to be examined by a psychiatrist in Connecticut and thereafter for a competency hearing to be held. A26-27. The defendant refused to cooperate with the psychiatrist appointed by the court to conduct the examination. Accordingly, on October 25, 1999, the court entered an order pursuant to 18 U.S.C. § 4241(b), committing the defendant to the custody of the Attorney General for thirty days to be placed in a suitable psychiatric facility for examination and report. A8. The defendant was committed to the custody of the U.S. Medical Center for Federal Prisoners in Springfield, Missouri (“MCFP-Springfield”).

On May 12, 2000, after receipt of an examination report indicating that the defendant was not competent to stand trial, the district court conducted a competency hearing at which numerous witnesses testified. A10.

By written order dated June 7, 2000, the district court concluded that the defendant was not competent to stand trial. The court ordered the defendant committed to the custody of the Attorney General for a period of three months, pursuant to 18 U.S.C. § 4241(d)(1), for the purpose of determining whether there was a substantial possibility that he would attain the capacity to stand trial in the foreseeable future. A10.

The defendant appealed the order to this Court, which affirmed by unpublished summary order dated October 2, 2000. A28-31. The defendant was returned to MCFP-Springfield for evaluation and treatment. After the defendant refused prescribed treatment with antipsychotic medication, an administrative involuntary medication hearing was held pursuant to 28 C.F.R. § 549.43. The medical personnel presiding at the hearing concluded that antipsychotic medication was appropriate. A44.

On October 13, 2000, the government requested that the district court supplement its order of June 7, 2000, to expressly authorize the Bureau of Prisons to involuntarily medicate the defendant based upon the administrative order. The court denied the request and ordered a judicial evidentiary hearing be conducted on the issue of involuntary medication of the defendant. A44.

On December 28, 2000, the district court conducted an involuntary medication hearing at which a Springfield psychiatrist and the defendant testified. A45.

By written order dated February 6, 2001, the district court concluded that the defendant could be involuntarily medicated to restore him to competency, subject to certain conditions. A32-42.

The defendant appealed the district court's involuntary medication order. On April 24, 2002, this Court ruled that the government had met its burden to show that it had an essential interest in rendering the defendant competent for trial but vacated and remanded for further findings with respect to whether the proposed course of treatment was sufficiently tailored to respect the defendant's liberty interests. *See United States v. Gomes*, 289 F.3d 71 (2d Cir. 2002).

The defendant petitioned the Supreme Court for a writ of certiorari. In the meantime, on June 16, 2003, the Supreme Court issued an opinion in *Sell v. United States*, 539 U.S. 166 (2003), setting forth the standards governing a trial court's consideration of a government request for involuntary medication of a defendant in order to render a defendant competent to stand trial.

On June 23, 2003, the Supreme Court granted the defendant's petition for certiorari and then vacated and remanded to this Court for reconsideration in light of *Sell*. *See Gomes v. United States*, 539 U.S. 939 (2003). This Court in turn remanded the case to the district court for reconsideration in light of *Sell*. *See United States v. Gomes*, 2003 WL 21655278 (2d Cir. July 11, 2003).

On July 23, 2003, the district court ordered that the defendant be transferred to the Springfield facility for 30 days for evaluation of his present competence to stand trial and assist in his defense, the probability that he would in the foreseeable future attain the capacity to proceed to trial, the proposed course of treatment to attain that capacity, and the factors set forth by the Supreme Court in *Sell*. A46.

On October 7, 2003, the district court conducted an involuntary medication hearing, at which it heard testimony from psychologist Dr. David F. Mrad and psychiatrist Dr. Robert G. Sarrazin of MCFP-Springfield. A62-160 (transcript).

By written ruling dated February 17, 2004, the district court entered an order that the defendant be returned to the custody of the Bureau of Prisons for treatment to restore him to competency to proceed to trial. In accordance with the factors set forth in *Sell*, the district court concluded that the defendant should be subject to the involuntary administration of antipsychotic medication. A43-61 (published at *United States v. Gomes*, 305 F. Supp.2d 158 (D. Conn. 2004)).

On February 20, 2004, the defendant filed a timely notice of appeal. A161. On February 26, 2004, the court granted the defendant's motion on consent of the government to stay its medication order pending this appeal. The defendant remains in custody at the Donald W. Wyatt Detention Facility in Central Falls, Rhode Island.

STATEMENT OF FACTS

A. The Offense Conduct

In the early morning hours of September 30, 1998, two officers of the Hartford Police Department observed the defendant “flag down” an out-of-state vehicle in a city neighborhood known for narcotics trafficking activity. The car pulled to the curb, and the defendant leaned inside the passenger window. When the officers’ marked police cruiser approached, the defendant saw them and jumped into the rear seat of the car. The car then sped away from the curb, in the vicinity of many pedestrians in the area. The officers pursued the car and initiated a stop. A21-22.

As the two officers approached the stopped car, they noticed that the defendant was passing something back and forth with the two people in the front seat. The defendant started to get out of the car but then retreated upon seeing one of the officers. The officer saw a white rock-like substance on the rim of the defendant’s boot, and a subsequent search of the defendant revealed a .25 caliber handgun in his front pocket. A22. Because of the defendant’s extensive felony history, he was federally charged with unlawful possession of a firearm by a convicted felon.

B. The Evidentiary Hearing

As noted in the “Statement of the Case” above, the trial of this matter has been postponed for several years pending the resolution of proceedings to determine the defendant’s competency and to authorize the government to

involuntarily administer antipsychotic medications for the purpose of rendering the defendant competent to stand trial.

Following this Court's most recent remand to the district court in light of the Supreme Court's decision in *Sell*, the district court ordered the defendant transferred to MCFP-Springfield for 30 days for a further evaluation. It directed medical personnel to file a report providing an opinion of the defendant's present competence to stand trial and assist in his defense, whether there was a substantial probability that he would attain the capacity to proceed to trial, the proposed course of treatment to attain that capacity, and the factors set forth in the *Sell* opinion.

On October 7, 2003, the district court conducted a hearing at which both Drs. Mrad and Sarrazin testified. The government also introduced at the hearing a written report, dated September 12, 2003, that summarized the observations and findings of Drs. Mrad and Sarrazin. A85

On the basis of the evaluation of the defendant from August 7 to September 5, 2003, and his prior examinations of the defendant, Dr. Mrad testified that the defendant has delusional disorder with grandiose and persecutory type. A73. The defendant continued to display, verbalize, and believe a set of delusions or false fixed beliefs that the criminal justice system, the district court, and a previous state judge in the Connecticut system were involved in a conspiracy against him. A73-74, 88-89. The defendant's delusion had a persecutory component in that he believed that efforts were being made behind the scenes to

manipulate what happens to him in the prison and court systems. A74. His delusion also had a grandiose component, as manifested in the defendant's claims that the courts had never seen someone who knew as much as he does, and that he was going to be represented at trial by a new and famous, powerful attorney such as Johnny Cochran. A74, 89. The defendant stated a belief that his aunt in Washington, D.C., was launching an investigation and would unveil the conspiracy against him. A90.

Dr. Mrad's latest evaluation was diagnostically more specific than the prior evaluation of 1999. A75. It also noted that the defendant manifested less hostility and was somewhat more cooperative than in 1999. *Id.* The defendant's behavior was generally less antisocial; he was willing to be around other inmates during recreation time. A75-76.

Dr. Mrad stated his view that the defendant was still not competent to stand trial. A76, 83-84. He continued to verbalize delusional ideas specifically related to his case and the prosecution against him. Given that those beliefs are fixed and consistent over time, Dr. Mrad opined that defendant was not rationally able to assist in his own defense and that he was viewing the case in light of his delusional and irrational ideas about the prosecution. A77, 83, 84.

In Dr. Mrad's opinion, treatment with antipsychotic medications was the most appropriate treatment to restore the defendant to competence and that other forms of treatment would not be effective in the absence of antipsychotic medication. A77-78, 80. The Bureau of

Prisons has a 70% or greater rate of success at MCFP-Springfield in restoring involuntarily medicated psychotic defendants to competency through the use of antipsychotic medications. A81, 91, 104. “The typical effect of these medications would be to restore someone’s thinking to its normal form, not to cause them to lose their ability to think or to interfere with their thinking.” A-102.

Moreover, in Dr. Mrad’s opinion, alternatives to medication would not be effective in restoring the defendant to competence. A78, 82-83. In response to questions posed by the district court, Dr. Mrad explained his view that the defendant was not suitable for “verbal therapy,” because of his lack of insight concerning his condition; the likelihood of success from verbal therapy alone was “very slim.” A82-83.

Dr. Sarrazin concurred in Dr. Mrad’s diagnosis of the defendant as having a delusional disorder of the grandiose and persecutory type. A111. He also testified that, in his opinion, the defendant was not currently competent to stand trial due to persecutory delusions that rendered the defendant unable to rationally consult with an attorney or assist in a defense. *Id.*

Dr. Sarrazin further testified that the medically appropriate and necessary treatment to restore the defendant to competence was treatment with antipsychotic medication. A112, 126-27. The Bureau of Prisons has more than a 70% rate of success in restoring involuntarily medicated defendants to competence. A118. In Dr. Sarrazin's opinion, there was a substantial possibility that the defendant would be restored to competence through

treatment with “atypical” antipsychotic medications. A118. On the other hand, less intrusive forms of treatment other than antipsychotic medication would not be effective because of the defendant’s lack of insight into his condition. A113, 126.

Dr. Sarrazin testified that antipsychotic medications can help reduce the prominence of delusions within the mental processes of patients such as the defendant. A116. On occasion these medications cause the delusions to go away completely, and at other times the delusions retreat to a background position where they do not affect every aspect of the patient’s life. A116-17.

Describing the possible side effects of antipsychotic medications, Dr. Sarrazin testified that he would first attempt to treat the defendant with the newer form of “atypical” antipsychotic medications that have come to the market within the past five to eight years. A114. Specifically, he would treat the defendant with Risperidone, Quetiapine, Ziprasidone, Aripiprazole, and Olanzapin. *Id.*

Possible side effects of such atypical antipsychotic medications include sedation, dryness of the mouth, problems with gastrointestinal abdominal complaints, diarrhea, and constipation. Very rarely are there problems with extra-pyramidal side effects, such as stiffness, constipation and urinary difficulties, and akathisia (patients feeling like their feet have to keep moving). A115, 118. Tardive dyskinesia, which can be permanent, is associated with use of typical antipsychotics, but occurs generally only to patients who receive higher dosages over

a longer period of time. A139, 152. Nuisance side effects, such as dryness of the mouth, often resolve over three to four days of use of the medication and are dosage related. A119. These side effects are countered by changing the dose of the medications. *Id.*

Dr. Sarrazin further testified that antipsychotic medication treatment administered at an appropriate dose and established over a period of dosage escalation results in few, if any, limitations on the patient's ability to participate in a trial and consult with his attorney. A120. "These medications would treat his delusional disorder, and lessening the extent that the persecutory delusions have on his functioning, they would in fact enhance his ability to communicate and discuss trial strategies and [talk] with his counsel." A121.

In Dr. Sarrazin's view, any sedation effect of the medications would be time-limited and dose-related. A121-122. The sedation effects vary from person to person and can be treated by amounts and timing of dosages. A122.

Dr. Sarrazin indicated that the defendant would be treated with oral medications such as Ziprasidone or Risperidone if he cooperated. *Id.* Risperidone and Olanzapine are available in dissolvable tablets, which permit the doctors to monitor whether the patient is complying with oral medication. A123. If the defendant did not cooperate, Ziprasidone is now available in a short-acting injectable intra-muscular form which can be given to a patient who refuses to take medications orally. *Id.* Dr. Sarrazin's experience in treating patients with

antipsychotic medications who refuse to take oral medications is that he begins with the medications in injectable form. When patients become more compliant or cooperative, they usually agree to take the oral medications and to work with the doctors. *Id.* Patients may begin with typical antipsychotics in injectable form and then may agree to take oral medications. A123, 129. They are monitored as medications are given, and an appropriate medication amount is determined so as to avoid as much as possible any detrimental side effects. A124.

Dr. Sarrazin also testified with regard to the monitoring of possible side effects after a patient is transferred from Springfield to another location to stand trial. A124. He noted that once a patient reaches a stable dosage of antipsychotic medication, the patient will usually not experience further side effects. A124-25. Thus, monitoring at a local correctional center would be oriented towards ensuring that the patient continues to take the medication as prescribed. A125-126, 148-49. Once a patient has been treated for a period of months at Springfield, the chances of a side effect becoming apparent at some later time is less likely. A150.

In response to questioning from the district court, Dr. Sarrazin testified that he would expect it to take between four to eight months of treatment for the defendant to attain competency. A128. Atypical antipsychotic medication would be used because “they are very effective medications for treating these illnesses and ... they have a much lower side effect profile, more easily tolerated than the more traditional older typical antipsychotics.” A128-29.

C. The District Court's Ruling

On February 17, 2004, the district court issued a 19-page ruling setting forth its finding in support of an order authorizing involuntary medication. A43-61. The court tracked the factors set forth by the Supreme Court's decision in *Sell v. United States*: (1) that important governmental interests are at stake; (2) that involuntary medication will significantly further those concomitant state interests; (3) that involuntary medication is necessary to further those state interests; and (4) that administration of the drugs is medically appropriate. A47. Noting that the *Sell* decision did not articulate the government's burden proof for each of the factors, the district court concluded that the standard should be "clear and convincing evidence," and it proceeded to determine that the government had met that standard as to all the *Sell* factors. A47.

As an initial matter, the district court concluded that the defendant was not presently competent to stand trial. It credited the medical testimony establishing that the defendant suffers from a delusional disorder with persecutory and grandiose components, all of which "render[ed] him unable to rationally consult with his attorney and to assist in his defense." A49.

In considering the first *Sell* factor – the importance of the government interests at stake – the court concluded that the interest in prosecuting the defendant for a serious firearms offense was substantial, as evidenced by the 15-year mandatory minimum sentence he faces under the Armed Career Criminal Act, and his likely sentencing

range under the Sentencing Guidelines of 262 to 327 months' imprisonment. A49-50. The court also noted the compelling government interest on account of the dangerousness of the specific conduct by the defendant, in that he possessed the firearm while selling drugs in a violent part of Hartford. A50-51.

Consistent with *Sell*'s suggestion that a trial court consider whether society could be protected by civil commitment instead of criminal confinement, the district court concluded that it could not be certain that the defendant would qualify for civil commitment, especially in view that "the disorders diagnosed in this case relate specifically to the competency determination and not to his risk of harming other persons or property." A52. It further noted that "[t]he mandatory minimum of fifteen years and the likely guideline range of 262-327 months imprisonment could very well be longer than any period of civil commitment." *Id.*

With regard to the second *Sell* factor – whether involuntary medication would in fact significantly further the government interest – the court reviewed at length the testimony of Drs. Mrad and Sarrazin regarding the likelihood of treatment success and the likelihood of adverse side effects, and then concluded that this factor was also satisfied:

In conclusion, the planned treatment with anti-psychotic medications is substantially likely to render Gomes competent to stand trial. The anti-psychotics will make his delusions less prominent and enhance his ability to communicate with his

attorney regarding his case and his defense. In addition, the side effects of the planned treatment with anti-psychotic medications, as testified to by Dr. Sarrazin, are substantially unlikely to interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.

A56.

The court also noted that once an appropriate stable dosage was reached, side effects were not likely to occur. A56. Monitoring would ensure that the defendant took the medications, many of which are available in a form that easily permits authorities to determine whether the medication has been taken. A57. "Under those circumstances, Dr. Sarrazin has indicated that side effects arising during trial is highly unlikely." *Id.*

As to the third *Sell* factor – that involuntary medication is necessary in view of less intrusive alternatives – the district court again credited the testimony of Drs. Mrad and Sarrazin, finding that alternative forms of treatment would not be effective in restoring the defendant to competency. This is due in large part to the defendant's lack of insight into his illness. A57. In addition, the court found that any less coercive form of court order than one that authorized forced medication (such as a simple court order backed by the contempt power) was not likely to be successful because of the defendant's continued insistence that he would not take medication under any circumstance. The court also noted the medical testimony that the defendant would be permitted to voluntarily take the medication before it would be forcibly administered. A58.

Regarding the fourth *Sell* factor – whether antipsychotic medication was medically appropriate – the court again relied on the medical testimony to conclude that the proposed course of treatment was, in light of its potential benefits and side effects, in the defendant’s “best medical interest” and “medically appropriate.” A59.

Finally, in accordance with the suggestion in *Sell* that a trial court also consider whether an order of medication would be warranted for purposes other than rendering the defendant competent for trial (*e.g.*, on the ground that the defendant was dangerous to himself or others), the district court determined that forced medication was not warranted for some purpose other than restoration of competency to stand trial. The defendant was not a danger to others in the prison environment and his health would not be endangered if he continued to refuse to take antipsychotic medications; therefore, “[c]ircumstances permitting treatment with anti-psychotic medications for those alternative purposes are not present here.” A60.

Accordingly, the district court concluded that an involuntary treatment order was warranted. “In light of the application of the *Sell* factors, including the efficacy, the side effects, the possible alternatives, and the medical appropriateness of anti-psychotic drug treatment, the Government has shown by clear and convincing evidence a need for drug treatment sufficiently important to overcome Mr. Gomes's liberty interest in refusing it.” A60.

The district court ordered that the defendant be returned to the custody of the Bureau of Prisons for

treatment in order to restore him to competence, finding that he could be involuntarily medicated if he refused to accept antipsychotic medications. The court set four months as an initial period for treatment, subject to extension on court approval. It directed the government to file monthly status reports during the treatment period. “After the medications have been administered and Mr. Gomes has been restored to competency, a report shall be filed with the Court regarding the results of the treatment of Mr. Gomes, how the medications will affect Mr. Gomes at trial, and how to closely monitor the effects of the medication throughout the trial.” A60-61. The district court order has stayed its order pending this appeal.

SUMMARY OF ARGUMENT

The district court did not clearly err with respect to its factual findings in support of its order authorizing involuntary treatment of the defendant for the purpose of rendering him competent to stand trial. Its decision tracks each of the requirements identified by the Supreme Court in *Sell v. United States*. At the outset, it correctly concluded that the government had an important interest in pursuing criminal charges against the defendant in light of the nature of his offense involving a firearm, his extensive felony history, and the very long prison sentence he faces if convicted. On the basis of the testimony of two mental health experts, the district court further concluded that the planned course of treatment was medically appropriate, likely to render the defendant competent to stand trial, did not present an undue risk of adverse side effects, and was the least intrusive yet efficacious form of treatment available to redress the defendant’s serious

mental illness. Because the defendant has failed to show error with respect to any of the district court's conclusions, this Court should affirm.

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR WITH RESPECT TO ITS FACTUAL FINDINGS IN SUPPORT OF ITS ORDER AUTHORIZING INVOLUNTARY MEDICATION OF THE DEFENDANT FOR THE PURPOSE OF RENDERING HIM COMPETENT TO STAND TRIAL

A. GOVERNING LAW AND STANDARD OF REVIEW

In *Sell v. United States*, 539 U.S. 166 (2003), the Supreme Court set forth the legal standard governing a trial court's authority to order that a criminal defendant be subject to involuntary treatment with antipsychotic medication for the purpose of rendering the defendant competent to stand trial:

[T]he 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.

Id. at 179.

The Court indicated that this standard implies the following factors: (1) that important governmental interests are at stake; (2) that involuntary medication will significantly further those concomitant state interests; (3) that involuntary medication is necessary to further those state interests; and (4) that administration of the drugs is medically appropriate, that is, in the patient's best medical interest in light of his medical condition. *Id.* at 180-181.

Although the Court in *Sell* did not announce a standard of proof, this Court, in its last opinion in the instant case, applied a “heightened scrutiny” standard to include a requirement that the district court make its findings by “clear and convincing evidence.” *Gomes*, 289 F.3d at 82.¹

On appeal, the Court reviews a district court’s legal determinations *de novo* and its findings of fact for clear error. *See, e.g., United States v. Banner*, 356 F.3d 478,

¹ Although the Supreme Court later granted, vacated, and remanded this Court’s *Gomes* opinion in light of *Sell*, this did not constitute a determination on the merits by the Supreme Court. *See Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 99 F.2d 33, 35 n.1 (2d Cir. 1993); *West v. Vaughn*, 204 F.3d 53, 59 (3d Cir. 2000), *abrogated on other grounds, Tyler v. Cain*, 536 U.S. 656 (2001); *Tallahassee Branch of NAACP v. Leon County, Fla.*, 827 F.2d 1436, 1440 (11th Cir. 1987). Therefore, the Court’s prior opinion in this case is no longer precedentially binding but has proper persuasive effect to the extent that it is not inconsistent with the Supreme Court’s intervening decision in *Sell*.

480 (2d Cir. 2004) (*per curiam*); *United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004).

B. DISCUSSION

The district court did not commit clear error or any error of law with respect to its order that the defendant be subject to involuntary treatment with antipsychotic medications for the purpose of rendering him competent to stand trial. The district court based its conclusion on the testimony of an expert psychologist and psychiatrist who each agreed that involuntary treatment with antipsychotic medications was medically appropriate, would likely restore the defendant to competence, did not risk undue side effects, and was necessary in view of the lack of viable, non-medication, treatment alternatives. The defendant did not introduce any contrary medical testimony or evidence.

In the absence of any meaningful challenge by the defendant, it cannot be said that the district court committed clear error with respect to any of the following findings of fact:

- that the defendant is not currently competent to stand trial because of persecutory delusions that render him unable to rationally consult with his attorney and to assist in his own defense [A49];
- that treatment with antipsychotic medication is medically appropriate for the defendant's condition [A58];

- that the Bureau of Prisons has at least a 70% rate of success in restoring defendants to competence with antipsychotic medications and that “the planned treatment with anti-psychotic medications is substantially likely to render Gomes competent to stand trial” [A52-53, 56];
- that treatment with antipsychotic medications will “enhance [the defendant’s] ability to communicate with his attorney regarding his case and his defense” and that the potential side effects “are substantially unlikely to interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense” and “side effects arising during trial is highly unlikely” [A56-57]; and
- that “any alternative, less intrusive means are unlikely to bring Gomes to competence” [A58];

Each of the arguments raised by the defendant in his brief on appeal are either facially meritless or rest on assumptions of fact that the defendant failed to establish below. First and principally, the defendant argues that “[t]he government interest in proceeding to trial is not sufficiently important to order forced medication.” Def. Br. at 18. But this Court has already ruled to the contrary:

In this case, we believe that the Government has an essential interest in bringing Gomes to trial. Gomes faces trial for a serious felony - - possessing a firearm as a felon. Both the seriousness of the crime and Gomes’s perceived dangerousness to

society are evident from the substantial sentence Gomes faces if convicted. Because he has committed at least three prior violent felonies or serious drug offenses, Gomes faces a possible statutory minimum of 15 years' imprisonment.

Gomes, 289 F.3d at 96.

As the district court noted, Gomes' actual sentence will likely be 262 to 327 months imprisonment, and the facts of the offense – involving possession of a gun by a multi-convicted felon engaged in apparent drug dealing activity – further establish a highly significant governmental interest in criminal prosecution. A49-51.

The Supreme Court's decision in *Sell* confirms the significance of the government's interest:

The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security

Sell, 539 U.S. at 179; *see also Gomes*, 289 F.3d at 85 (noting that governmental interest in prosecution “will generally be essential” but is “case-specific” by reference to “whether the crime is one that is broadly harmful, such as drug trafficking, ... whether it is classified as a felony and carries a substantial penalty, and whether the defendant poses a danger to society, based on the charged

conduct, his past conduct, or both”) (internal citations omitted).²

The defendant protests that the charged crime simply involves possessing a handgun, and “[t]he government has presented no evidence that Mr. Gomes has ever utilized that handgun or that the handgun itself has been used in a criminal offense.” Def. Br. at 22. But the government need not show that the defendant shot someone. The danger presented by convicted felons carrying firearms cannot be overstated. This Court has ruled that the felon-in-possession statute, 18 U.S.C. § 922(g)(1), is no less than a “crime of violence” because “[t]he risk of violent use posed by a convicted felon's possession of firearms is significant.” *United States v. Dillard*, 214 F.3d 88, 94 (2d Cir. 2000).

The defendant speculates that he happened to have been arrested “when a federal firearms-enforcement project was in high gear” and that “[h]ad he been arrested

² For these reasons, the defendant’s reliance on a District of Maine decision in *United States v. Dumeny*, 295 F. Supp. 2d 131 (D. Me. 2004), is misplaced. See Def. Br. at 22. In *Dumeny*, a district court concluded that the government’s interest was not sufficient to warrant involuntary treatment in a case involving a defendant charged under 18 U.S.C. § 922(g)(4) with possession of a firearm by a person previously subject to a mental health commitment order. The *Dumeny* decision was rendered with little analysis, is inconsistent with this Court’s prior decision in *Gomes*, and is distinguishable because it did not involve the greater penalties prescribed by the Armed Career Criminal Act.

after terrorism began to occupy the attention of federal authorities, his prosecution would probably have remained a state prosecution.” Def. Br. at 23. The relevant constitutional inquiry, however, is the significance of the governmental prosecution interest *in general*—not whether a particular type of prosecution is of more interest to the state government than the federal government. In any event, the enactment and enforcement of the federal Armed Career Criminal Act demonstrates the strong and continuing federal interest in removing from society persons like the defendant who have long felony histories and who nonetheless decide to possess firearms.

Indeed, even in this age of post-September-11 terrorism, the federal government has continued to invest immense resources – with acclaim and success – into the prosecution of firearms offenses in inner-city areas where drug and gang violence has been most prevalent. *See, e.g.*, United States Attorney’s Office for the District of Connecticut / Project Safe Neighborhoods (www.usdoj.gov/usao/ct/psn.html) (describing Project Safe Neighborhoods program involving extensive federal-state coordination and noting 20.2% national increase in number of federal firearm prosecutions in 2002 and 100% increase in firearm prosecutions in Connecticut from 1999 to 2002); Editorial, *Bridgeport Streets Are Even Safer*, CONNECTICUT POST, June 2, 2004 (noting “dramatic drop in violent crimes” in Bridgeport, Connecticut, due in part to “the success of Project Safe Neighborhoods, a nonsense joint [federal-state] program that began in 2002 and focuses on convicted felons”); Stacey Stowe, *Spreading A Message About Gun Crime*, N.Y. TIMES, July

20, 2003, at Section 14, p. 3, col. 1 (describing Connecticut federal firearms prosecutions).

The defendant next argues that “[t]he likelihood of his civil commitment is great,” Def. Br. at 18, and that this undermines the government’s interest in pursuing a criminal prosecution. But, as the Supreme Court noted in *Sell*, the prospects for civil commitment is just one factor to consider in gauging the strength of the government’s interest in rendering a defendant competent to stand trial. “We do not mean to suggest that civil commitment is a substitute for a criminal trial.” 539 U.S. at 179.

Moreover, the record is far from clear that the defendant would be subject to civil commitment. A civil commitment proceeding would require the government to show by clear and convincing evidence not only that the defendant had a mental illness or abnormality but also that the defendant posed a future danger to himself or others as a result of his mental condition. *See Kansas v. Handpicks*, 521 U.S. 346, 358-60 (2002); *Foucha v. Louisiana*, 504 U.S. 71, 75-79 (1992). Here, both Dr. Mrad and Dr. Sarrazin testified that the defendant was not a danger within the prison environment. A81, 82, 112. Dr. Mrad was unable to render an opinion whether the defendant would qualify for civil commitment. A80. Although the defendant doubtlessly poses a danger of recidivism if he were released into the community, it is less apparent that the defendant’s threat to society stems from his mental illness, as the government would have to show in order to justify his civil commitment.

Thus, the district court observed that “it is almost impossible to predict the outcome of civil commitment proceedings in many cases, [and] here it is especially problematic in that the disorders diagnosed in this case relate specifically to the competence determination and not to his risk of harming other persons or property.” A51-52. Moreover, the district court noted that the projected length of the defendant’s sentence “could very well be longer than any period of civil commitment.” A52. The possibility of civil commitment does not undermine the government’s interest in bringing the defendant’s criminal charge to trial.

Conceding that “the Bureau of Prisons enjoys a 70% success rate in administering drugs that will restore a defendant to competency,” the defendant questions whether “such a success rate[] satisfies the Supreme Court’s requirement [in *Sell*] that the administration of drugs is ‘substantially likely’ to render Mr. Gomes competent.” Def. Br. at 25. But the term “substantially likely” does not connote any particular mathematical probability, much less one as high as 70%. And this Court has previously observed that “[t]he district court need only find that it is sufficiently likely, in light of the importance of the government’s interest in prosecution, that the medication will restore the defendant to competence ...; *it need not find that the medication is absolutely certain to have the desired effect.*” *Gomes*, 289 F.3d at 87 (emphasis added); *cf. Dillard*, 214 F.3d at 94-95 (where statute requires determination of “substantial risk” of violence from felon-in-possession offense, “[f]or the risk to be ‘substantial,’ it is certainly not necessary that all or even most such illegal possessions create the risk of violence,”

but “[i]t is sufficient that the risk be material, important, or significant”). Especially in the absence of particularized evidence to suggest that the defendant would not respond to antipsychotic medications in the way that most patients do, the district court did not clearly err by concluding that it was substantially likely that the defendant would be restored through medications to competence for trial.

The defendant further contends that his treatment will not be properly supervised once he is rendered competent and returned from the medical facility in Springfield to a jail in Connecticut or nearby Rhode Island to stand trial. Def. Br. at 28. But, as Dr. Sarrazin testified, at that point in time, the defendant’s condition will have stabilized and all that will likely be required is to ensure that he is compliant with the medication regime. A124-26, 148-49. Moreover, the district court required the filing of a report at the conclusion of treatment in Springfield and a discussion of “how the medications will affect Mr. Gomes at trial, and how to closely monitor the effects of the medication throughout trial.” A60-61. Any remaining trial-type concerns that the defendant may have can be raised and preserved with the district court when they are ripe for review at trial.

The defendant also faults the district court for not requiring other forms of treatment other than antipsychotic medication. *See* Def. Br. at 28-29. But both medical experts testified without reservation that non-medication forms of treatment could not succeed on their own because of the defendant’s fundamental lack of insight into his own condition. A82-83, 113, 126. Nor did the defendant volunteer to try any other form of treatment.

Oddly, the defendant also seems to complain that he has not been appointed a guardian *ad litem*, yet insists that he would oppose such an appointment. Def. Br. at 29. This issue should play no role in this Court's determination of the appeal, because there is no evidence that the defendant's refusal to take drugs would put his health gravely at risk – that the evidence would legally suffice to permit appointment of a guardian to make medication decisions on the defendant's behalf. *See* Conn. Gen. Stat. §§ 45a-644 to 45a-663, § 17a-543 (appointment where person has mental condition resulting from illness which results in the person's inability to care for himself or mental health needs, which results in endangerment to such person's health).

Finally, the defendant argues that antipsychotic medications will not enhance his ability to cooperate with counsel, because his deluded “law-enforcement conspiracy” defense “is as likely to succeed as any other defense that might be mounted.” A27. But this argument does not address the point that the defendant has been found incompetent because of a mental illness and that he cannot be tried until that illness is treated. Treatment of the defendant will likely clear or reduce his delusions. He may then still pursue a law-enforcement conspiracy defense at trial if he wishes – but he must do so while mentally competent.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 8, 2004

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Thomas V. Daily". The signature is written in a cursive style with a large initial 'T' and 'D'.

THOMAS V. DAILY
ASSISTANT U.S. ATTORNEY

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ASSISTANT U.S. ATTORNEY (of counsel)