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SECOND CIRCUIT REVIEW

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Forced Medication of a Non-Dangerous Criminal Defendant

IN THIS month's column, we report on a recent decision by the United States Court of Appeals for the Second Circuit in which the Court considered a matter of first impression in this Circuit: the circumstances under which a non-dangerous criminal defendant may be involuntarily medicated for the purpose of rendering him competent to stand trial.

In *United States v. Gomes*,¹ the Second Circuit, in an opinion written by Chief Judge John M. Walker Jr. and joined by Judges Jose A. Cabranes and Chester J. Straub, applied a heightened-scrutiny standard to determine when the government's interest in prosecuting a criminal defendant might outweigh that defendant's right to be free from forced medication, thus allowing the involuntary medication of that defendant. The Court's application of a heightened-scrutiny standard aligns the Second Circuit with the Eighth Circuit and the District of Columbia Circuit² and creates a conflict with the Sixth Circuit.³

Background

On Sept. 30, 1998, defendant Aaron Gomes was arrested for possession of a pistol without a permit, possession of a controlled substance, possession of narcotics and theft of a firearm. On



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Oct. 27, 1998, a federal grand jury indicted Mr. Gomes on one count of possession of a firearm by a convicted felon in violation of 18 USC §§922(g)(1) and 924(a)(2). Because Mr. Gomes had at least three prior convictions for violent felonies or serious drug offenses, if convicted on these charges, he would be subject to a sentence enhancement as an Armed Career Offender with a mandatory minimum sentence of 15 years imprisonment.

Prior to the trial on these charges, Mr. Gomes' counsel raised the question of Mr. Gomes' competency to stand trial and requested authorization to have a psychiatrist determine his competency. Mr. Gomes refused to participate in the examination by the psychiatrist, and the district court, on its own motion and without the benefit of expert testimony, found that there was reasonable cause to believe that he may be mentally incompetent. The district court ordered that Mr. Gomes be committed to the custody of the Attorney General, pursuant to 18 USC §4247(b), for placement in a suitable psychiatric facility for 30 days to examine his mental health and competency to stand trial. Mr. Gomes was placed in the U.S. Medical Center for Federal Prisoners in Springfield, Mo.

Mr. Gomes refused to participate in the competency hearing scheduled by the district court. He obstructed the proceedings to the point that he was removed from the courtroom. Eventually, without objection from counsel for either side, the district court held the competency hearing without Mr. Gomes being present. A Bureau of Prisons forensic psychologist who had examined him testified that Mr. Gomes was incompetent to stand trial because he lacked a rational understanding of the proceedings against him and he suffered from an "undefined psychotic disorder."

Based on the psychologist's testimony, the district court found Mr. Gomes incompetent to stand trial and ordered him committed to the custody of the attorney general for an additional three months to determine whether there was a substantial probability that Mr. Gomes would attain the capacity to stand trial in the foreseeable future. The Second Circuit affirmed the district court's order in an unpublished summary order.

When Mr. Gomes was examined again on his return to the medical center, he was prescribed antipsychotic medication, which he refused to take. Pursuant to the rules and procedures in 28 CFR §549.43, an administrative proceeding was held at the medical center to determine whether Mr. Gomes could be involuntarily medicated. The psychiatrist who presided at the hearing concluded that involuntary medication was appropriate because "it was the indicated treatment for Gomes' illness and other forms of treatment would not be likely to alleviate his symptoms."⁴

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Mr. Gomes continued to refuse to take the antipsychotic medication.

The government then moved to have the district court include in its commitment order an authorization for the Bureau of Prisons to medicate Mr. Gomes involuntarily. The district court denied the government's request, finding that because the government's interest in medicating Mr. Gomes was to render him competent to stand trial (as opposed to pacifying a dangerous detainee), a judicial hearing was necessary to determine whether involuntary medication could be ordered.⁵

At the hearing, the government argued that it need only show by a preponderance of the evidence that "(1) weighing the benefits against the risks, the medication was medically appropriate; and (2) there were no less intrusive means that would enable the government to bring the defendant to trial." Alternatively, the government argued that even if strict scrutiny applied, it would meet such a standard in this case.⁶

The District Court's Test

The district court found that it could order the involuntary medication of Mr. Gomes only if it was "necessary to accomplish an essential government interest." The district court created a 13-part test to determine whether involuntary medication was appropriate. The government had to prove the first eight factors by clear and convincing evidence:

- (1) whether the government has an overriding justification for involuntarily medicating the defendant;
- (2) whether psychotropic medication is medically appropriate and necessary;
- (3) whether there are any less intrusive means to restore the defendant to competency;
- (4) whether there is a sound medical basis for administering psychotropic medication;
- (5) whether there is any significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel;
- (6)

whether there are any apparent side-effects of the psychotropic medication; (7) whether there are any other indications that the medication will in any way interfere with the defendant's ability to provide information to his attorney and to participate in the making of decisions on his own behalf at trial; and (8) whether the defendant's appearance will be adversely [a]ffected or whether he will suffer other prejudice at trial as a result of involuntary medication.⁷

Five Additional Factors

The district court then weighed five additional factors: "(1) the competing interests of the defendant and the government; (2) the dangerousness of the defendant; (3) the seriousness of the charged crime; (4) the possibility of the defendant's release in the event that he cannot be made to stand trial; and (5) the availability of less intrusive means by which the defendant could be restored to competency."⁸

The district court found that the government had an essential interest in enforcing the federal criminal laws. The district court also found that the psychologist's testimony established that the administration of antipsychotic drugs was medically appropriate, there was no less intrusive means of rendering Mr. Gomes competent to stand trial and there was a high likelihood that the drugs would have the desired effect. Further, the district court found that the risks of side effects were neither sufficient to prohibit the use of the drugs nor likely to interfere with Mr. Gomes' ability to participate in his trial. Thus, the district court concluded that the government had met its burden of proof and ordered the involuntary medication of Mr. Gomes. He appealed.

The Second Circuit first examined whether it had appellate jurisdiction over Mr. Gomes' appeal. The court noted that the collateral-order doctrine provides for jurisdiction over non-final orders that conclusively determine a disputed question separate from the merits of a case

and are effectively unreviewable on appeal from the final judgment in the case. In line with decisions of the Fourth and Sixth circuits,⁹ the court found that an order authorizing involuntary medication was an appealable collateral order because it conclusively determined whether the defendant could be involuntarily medicated, it was separate from the underlying criminal charges against the defendant and it was effectively unreviewable as soon as the defendant was involuntarily medicated.

'Riggins v. Nevada'¹⁰

The Supreme Court's 1992 decision in *Riggins v. Nevada* provided the background for the Second Circuit's analysis in *Gomes*. The defendant in *Riggins*, who was sentenced to death following a conviction for murder and robbery, challenged on appeal the state court's denial of his request to halt the administration of antipsychotic drugs during his trial. Because the state court in *Riggins* had made no determination of the defendant's need for the medication or any findings about reasonable alternatives, the Supreme Court reversed the state court's order. The Supreme Court, however, declined to prescribe a substantive standard for involuntary medication.

The Second Circuit's Test

The Second Circuit interpreted the Supreme Court's decision in *Riggins* to require a heightened — but not strict — standard of scrutiny for determining whether a non-dangerous criminal defendant may be involuntarily medicated with antipsychotic drugs to render him competent to stand trial. The Second Circuit found that to satisfy the heightened scrutiny standard, the government must prove by clear and convincing evidence that (1) trying the defendant will serve an essential government interest; (2) the proposed treatment is medically appropriate; (3) the treatment is necessary to restore the defendant to competence to stand trial; and (4) the defendant can be fairly tried while under medication. The

court also found that when a district court authorizes involuntary medication, it should closely monitor the medication process to ensure that the test is met on a continuing basis and that the proper dosage is given to the defendant.¹¹

Competing Interests

The Competing Interests of the Defendant and the Government. The Second Circuit next considered the defendant's interest in avoiding unwanted medication and the government's countervailing interest in prosecuting a criminal defendant. The court recognized that a criminal defendant has a substantial liberty interest in being free from bodily intrusion under the Due Process Clause of the Fourteenth Amendment and a right to a fair trial under the Sixth Amendment. Mr. Gomes argued that the serious side effects of antipsychotic medication would interfere with his right to a fair trial by, for example, potentially making him look bored or unfeeling, which could prejudice the jury against him and affect the outcome of the trial. The side effects may also interfere with his willingness and ability to assist in his defense. Such concerns were outlined in Justice Kennedy's concurrence in *Riggins*.¹² Although the Second Circuit acknowledged that these concerns were serious, the court found that there have been significant improvements in antipsychotic medication in the 10 years since the Supreme Court's decision in *Riggins*. The court noted that there is a new generation of antipsychotic drugs, called atypicals, that present a relatively low risk of side effects.¹³

The court then examined the government's interest in bringing a criminal defendant to trial. The court noted that while civil commitment may reduce the defendant's danger to the community, it does not address other important functions of the criminal justice system, like retribution, deterrence and investigative functions.¹⁴ As such, the court stated that "[t]he government's interest in the

prosecution of crime generally is a substantial and important interest, and it is usually an essential one."¹⁵ To determine whether the government's interest in bringing a defendant to trial is essential, the Second Circuit found that a court should consider whether the crime with which the defendant is charged is broadly harmful (like drug trafficking or health care fraud), whether the crime is a felony with a substantial penalty and whether the defendant poses a danger to society based on the charged conduct as well as his past conduct.

The court rejected the Sixth Circuit's application of a strict-scrutiny standard as unduly restrictive.¹⁶ It reasoned that because strict scrutiny has become "fatal in fact," a more flexible regime is appropriate and can adequately protect both the government's and the defendant's interests.

The Second Circuit remanded the case to the district court for application of its heightened-scrutiny test, and previewed its analysis of the issues. The court noted that the government's interest in bringing Mr. Gomes to trial was essential because he is charged with a serious felony crime and faces a potential statutory minimum of 15 years imprisonment. Mr. Gomes also has a history of serious criminal behavior. The court observed that a defendant's liberty interest might trump the government's interest in bringing a defendant to trial where, for example, a defendant was charged as a first-time offender with the theft of a letter, or the unlawful possession of a small amount of drugs for personal use.

The court acknowledged that the testimony of the treating psychologist might satisfy the government's burden of proving that it was medically appropriate to treat Mr. Gomes with antipsychotic drugs. Because of the length of time between the date of the testimony and the Second Circuit's consideration of such testimony, however, the court found that the district court on remand should update the psychologist's testimony.

The court then commented that the government need only prove that it is

sufficiently likely that the medication will restore the defendant to competence and that it will not produce undue side effects in order to satisfy the last two factors of its test. Finally, the court stated that if the district court grants the government's motion and allows forced medication, it must provide continued monitoring of Mr. Gomes' ability to receive a fair trial when the actual side effects of the medication are apparent.

The Second Circuit's "heightened-scrutiny" test provides a pragmatic approach balancing a criminal defendant's due process right to be free from involuntary medication and the government's interest in bringing criminal defendants to trial. With the Sixth Circuit applying a strict scrutiny test, however, the Supreme Court may ultimately be called upon to resolve the split between the circuits.

(1) No. 01-1143, 2002 WL 704679 (2d Cir. April 24, 2002).

(2) *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002); *United States v. Weston*, 255 F.3d 873 (D.C. Cir.), cert. denied, 122 S. Ct. 670 (2001).

(3) *United States v. Brandon*, 158 F.3d 947, 950-51 (6th Cir. 1998).

(4) *Id.* at *2.

(5) *Id.* at *3.

(6) The Sixth Circuit in *United States v. Brandon*, 158 F.3d 947, 957 (6th Cir. 1998), held that strict scrutiny applied to determine whether a defendant could be involuntarily medicated.

(7) *Gomes*, 2002 WL 704679, at *3-4 (alteration in original).

(8) *Id.* at *4.

(9) *United States v. Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999); *United States v. Brandon*, 158 F.3d 947, 950-51 (6th Cir. 1998).

(10) 504 U.S. 127 (1992).

(11) *Gomes*, 2002 WL 704679, at *7-8.

(12) *Riggins*, 504 U.S. at 138-45 (Kennedy, J. concurring).

(13) Mr. Gomes further argued that because antipsychotic drugs may interfere with his ability to communicate with his counsel, his First Amendment rights were implicated and strict scrutiny should have applied. The court rejected this contention, however, reasoning that, Mr. Gomes' First Amendment rights were coextensive with his Due Process right to a fair trial and, therefore, were considered together by the court. Moreover, the court found that since any order of involuntary medication would be content-neutral, strict scrutiny would not apply.

(14) *Gomes*, 2002 WL 704679, at *6 (quoting *Weston*, 255 F.3d at 882).

(15) *Id.*

(16) See *Brandon*, 158 F.3d at 947.