



COMMONWEALTH of VIRGINIA

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September 20, 2007

The Honorable William J. Howell
Speaker, House of Delegates
P.O. Box 406
Richmond, Virginia 23218

Dear Mr. Speaker:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a local court may authorize the superintendent of a regional jail¹ to force individuals in his custody who are awaiting trial or currently serving sentences to take prescribed medication for the treatment of mental illness.

Response

It is my opinion that a local court in limited circumstances may issue an order under § 19.2-169.2(A) or 19.2-169.3 authorizing the superintendent of a regional jail to force an individual in his custody to take prescribed medication for treatment of mental illness to restore his competency to stand trial. It further is my opinion that the court having jurisdiction over such individual's trial may enter such an order to restore competency pursuant to § 19.2-169.2(A) or 19.2-169.3. Additionally, when a court previously has entered an order to restore competency, any court with jurisdiction may enter the order pursuant to § 37.2-1101, as limited by § 37.2-1102(3).

Background

You state that due to a reduction in psychiatric facilities, regional jails are housing more people with mental illness. You advise that these jails often are not equipped to provide the psychiatric care required by such persons. Further, you relate that many of the incarcerated persons refuse to take prescribed medications. Such refusal results in mental deterioration requiring transfers to state hospitals where the individuals typically are forced to take the medication.

State psychiatric hospitals often obtain court authorization to administer medication over the objection of patients. You relate that it is not as common for correctional facilities to obtain such

¹ Although I use the term "regional jail," the analysis equally is applicable to local jails and jail authorities and their respective administrators.

authorization. You relate that persons charged with relatively minor offenses may remain incarcerated for extended periods of time because complications related to their mental illness and brought about by their refusal to take medications render them incompetent to stand trial.

Applicable Law and Discussion

Courts long have recognized that involuntary medical treatment raises constitutional questions.² Section 19.2-169.2(A) mandates that:

Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant ... is incompetent, the court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for treatment of persons under criminal charge.

However, § 19.2-169.2(A) does not necessarily authorize forced administration of antipsychotic medication.³ The Supreme Court of the United States recognizes that individuals have a “significant” constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs.⁴ The Due Process Clause of the Constitution of the United States⁵ permits a state “to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will [when] the inmate is a danger to himself or others and his treatment is in the inmate’s medical interest.”⁶

The General Assembly has established a procedure for courts to authorize treatment for individuals who lack capacity to make an informed decision regarding treatment of mental disorders in Chapter 11 of Title 37.2, §§ 37.2-1100 through 37.2-1109.⁷ Section 37.2-1102(3), however, prohibits a court from authorizing the administration of antipsychotic medication for more than 180 days over a person’s objection unless he “is subject to an order of involuntary admission, including involuntary outpatient treatment, previously or simultaneously issued under §§ 37.2-814 through 37.2-819 or Chapter 9 (§ 37.2-900 et seq.) of [Title 37.2], or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.”

However, when the sole and overriding intent for the forcible administration of medication is to restore the defendant’s competency to stand trial, the government may seek an order under

²See *Sell v. United States*, 539 U.S. 166, 178 (2003); *Winston v. Lee*, 470 U.S. 753, 759 (1985); see also VA. CODE ANN. § 53.1-40.1(A), (C) (2005) (allowing Director of Department of Corrections to petition certain courts to authorize medical treatment when prisoner is incapable of giving informed consent).

³For purposes of this opinion, I assume that “prescribed medication” refers to antipsychotic drugs or drugs that would otherwise treat a mental illness.

⁴See *Washington v. Harper*, 494 U.S. 210, 221-23 (1990).

⁵U.S. CONST. amend. XIV, § 1.

⁶*Harper*, 494 U.S. at 227.

⁷I note that § 53.1-40.1, which authorizes the Director of the Department of Corrections to petition courts to authorize medical and mental health treatment for prisoners incapable of giving consent, is only applicable to prisoners sentenced and committed to the Department of Corrections.

§ 19.2-169.2(A) or 19.2-169.3,⁸ or § 37.2-1101, as limited by 37.2-1102, if it meets a four-part test.⁹ The government must be able to prove that: (1) there is an “important governmental interest” at stake; (2) the medication is “substantially likely” to render the person competent and “substantially unlikely” to have side effects that would significantly interfere with the person’s ability to assist counsel; (3) the involuntary medication is necessary to further the government interest; and (4) the medication is “medically appropriate,” *i.e.*, in the defendant’s best medical interests.¹⁰ The local court must consider the purpose for the forced medication request to determine whether to apply this test.¹¹

You note a particular concern regarding persons charged with minor offenses who remain incarcerated for extended periods as the result of complications related to their refusal to take such prescribed medications. If the state’s interest is restoration of competency to stand trial, the applicable standard is the four-part test articulated in *Sell*.¹² First, the four-part test requires the governmental interest to be “important.”¹³ “An ‘important’ governmental interest exists when the defendant is accused of a ‘serious’ crime and ‘[s]pecial circumstances’ do not undermine the government’s interest in trying him for that crime.”¹⁴ A special circumstance that potentially undermines the governmental interest in prosecuting a criminal defendant includes a situation in which a defendant has been held pretrial for more time than he would likely receive upon conviction.¹⁵ Therefore, under such circumstances, it is less likely that the state can show the governmental interest is “serious.” To satisfy the second and fourth parts of the test, jail authorities must be able to show that the antipsychotic drugs are “substantially likely” to render the person competent and “substantially unlikely” to interfere with the person’s ability to assist in his own defense.¹⁶ In order to receive permission to forcibly medicate persons in custody awaiting trial, the state must specify “the particular medication, including the dose range,”¹⁷ and relate that treatment plan to the particular characteristics of the individual defendant.¹⁸ Further, such treatment plan must address why the treatment is proposed, how long the treatment is to be administered, the criteria by which

⁸Section 19.2-169.3(A) permits the court to make subsequent review of a defendant’s competency: “If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant’s initial admission under subsection A of § 19.2-169.2.” Section § 19.2-169.3(B) further authorizes the court to order continued treatment for additional six month periods, provided a hearing is held at the completion of each such period, and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

⁹*See Sell*, 539 U.S. at 180-81.

¹⁰*Id.*

¹¹*See United States v. Baldovinos*, 434 F.3d 233, 240 (4th Cir. 2006).

¹²*See Sell*, 539 U.S. at 180-81.

¹³*Id.* at 180.

¹⁴*United States v. Evans*, 404 F.3d 227, 235 (4th Cir. 2005) (alteration in original) (quoting *Sell*, 539 U.S. at 180)).

¹⁵*See id.* at 239. However, this factor is not dispositive. *Id.* There may be an important interest in trying a defendant accused of a serious crime even when the pretrial detention is approaching the maximum statutory penalty for the crime with which he is charged.

¹⁶*Sell*, 539 U.S. at 181-82.

¹⁷*Evans*, 404 F.3d at 241.

¹⁸*See id.* at 242.

treatment will be discontinued, the probable benefits, and the possible side effects.¹⁹ The plan must explain how “the benefits of the treatment plan outweigh the costs of its side effects” in restoring competency.²⁰ The court with jurisdiction over an individual’s criminal trial may then enter an order to restore competency under § 19.2-169.2(A) or 19.2-169.3. Additionally, if a court previously has entered an order to restore an individual to competency, any court with jurisdiction may enter such an order pursuant to § 37.2-1101, subject to the limitations in § 37.2-1102(3). Otherwise, I find no other method that complies with due process standards that have been established to force an individual to take antipsychotic medication over his objection merely for treatment purposes.

Whether a state may involuntarily medicate a defendant for the purpose of rendering him competent for sentencing is unresolved.²¹ In deciding sufficiency of counsel, the United States Court of Appeals for the Fourth Circuit specifically refused to address the issue of forced medication for the purpose of restoring competency for sentencing purposes.²² Sentencing, however, is a continuation of the criminal trial process, and the defendant continues to enjoy a constitutional right to counsel.²³ While sentencing might require less involvement by the criminal defendant in comparison to the trial phase, the sentencing phase nevertheless requires some participation. Thus, it is likely that the principles of the four-part test would apply to a criminal defendant who loses competency awaiting sentencing.

Conclusion

Accordingly, it is my opinion that a local court in limited circumstances may issue an order under § 19.2-169.2(A) or 19.2-169.3 authorizing the superintendent of a regional jail to force an individual in his custody to take prescribed medication for treatment of mental illness to restore his competency to stand trial. It further is my opinion that the court having jurisdiction over such individual’s trial may enter such an order to restore competency pursuant to § 19.2-169.2(A) or 19.2-169.3. Additionally, when a court previously has entered an order to restore competency, any court with jurisdiction may enter the order pursuant to § 37.2-1101, as limited by § 37.2-1102(3).

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

3:514; 1:1357; 1:941/07-006

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Baldovinos*, 434 F.3d at 242-43; cf. *United States v. Wood*, 459 F. Supp. 2d 451 (E.D. Va. 2006) (holding that *Sell* test controls).

²² *Id.*

²³ See *McConnell v. Rhay*, 393 U.S. 2, 4 (1968).