

**STATE OF MAINE
KENNEBEC, ss.**

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. KEN-16-141**

**ISMAIL M. AWAD,
Appellant**

V.

**STATE OF MAINE,
Appellee**

ON APPEAL FROM THE SUPERIOR COURT

**BRIEF OF AMICUS CURIAE
OFFICE OF THE MAINE ATTORNEY GENERAL**

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FACTS AND PROCEDURAL HISTORY

The Office of the Attorney General is submitting this *amicus* brief in the matter of *State of Maine v. Ismail M. Awad*, Law Court Docket No. KEN-16-141, with the consent of the parties. *Amicus* will address the issues of the appropriate standard of appellate review of a motion court's decision on the State's motion, pursuant to 15 M.R.S. §106, to involuntarily medicate a defendant to achieve competency to proceed with the criminal process; whether the trial court's findings are sufficient for appellate review; and whether the motion court should have proceeded on the State's motion, or conducted further inquiry as to the necessity of involuntary medication for other reasons. *Amicus* does not address the sufficiency of the factual findings under the applicable standard.

The facts and procedural history of Mr. Awad's pending criminal matters and the hearing conducted by the court are set out in detail in the briefs of the Appellant, Defendant Ismail Awad, and the Appellee, State of Maine.

ISSUES

I. What is the standard of review of a motion court's determination, pursuant to 15 M.R.S. § 106, that a criminal defendant be medicated over the defendant's objection for purposes of achieving or restoring competency?

II. Whether the motion court's Order complies with the requirement in 15 M.R.S. § 106 to make findings on each of the statutory factors and is sufficiently specific for review by this Court.

III. Whether the record supports the court's decision to determine the issue of involuntary medication for competency purposes pursuant to 15 M.R.S. § 106 in the absence of proceedings regarding involuntary medication for other purposes.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

The decision under review is the motion court's decision to order that Mr. Awad be "medicated over [his] objection" to restore competency. 15 M.R.S. § 106(2). The United States Supreme Court established the constitutional standard for determining whether a defendant can be involuntarily medicated solely for competency purposes. *Sell v. United States*, 539 U.S. 166 (2003). The Maine Legislature recently enacted a statute explicitly incorporating the *Sell* factors. 15 M.R.S. § 106, P.L. 2015, ch. 325 (emergency, effective July 7, 2015). Identifying the appropriate standard of review for this decision to involuntarily medicate is the primary issue on appeal.

The Maine statute breaks the four *Sell* factors into five:

B. The court, in determining whether a defendant should be medicated over the defendant's objection, shall consider whether:

- (1) Important state interests are at stake in restoring the defendant's competency;
- (2) Involuntary medication will significantly further important state interests, in that the medication proposed:
 - (a) Is substantially likely to render the defendant competent to proceed; and

- (b) Is substantially unlikely to produce side effects that would significantly interfere with the defendant's ability to assist the defense counsel in conducting the defendant's defense;
- (3) Involuntary medication is necessary to further important state interests;
- (4) Any alternate less intrusive treatments are unlikely to achieve substantially the same results; and
- (5) The administration of the proposed medication is medically appropriate, as it is in the defendant's best medical interest in light of the defendant's medical condition.

15 M.R.S. § 106(3)(B)(1)-(5). Sub-paragraphs (3) and (4) together constitute the third *Sell* factor, and are essentially alternative formulations of the same foundational facts. *Sell*, 539 U.S. at 180-81.

This Court should review the motion court's decision to authorize involuntary medication as a mixed question of law and fact. The inquiry is fact-intensive, but the ultimate determination—whether to involuntarily medicate—requires the application of legal principles to the facts, and thus is reviewed *de novo*, akin to the determination of the voluntariness of a confession, the validity of a *Miranda* waiver, or civil involuntary commitment. The five statutory prongs underlying the decision to medicate call primarily for findings of fact, but the first—whether important state interests are at stake—again calls for the application of legal principles to historical facts, and thus again is a mixed question calling for independent review of the conclusion, with deference to the motion court's

determination of the found facts underlying it. The remaining factors are factual findings entitled to deference by the reviewing court.

To prevail on a motion to medicate the defendant over his objection solely for competency purposes, the State must establish the *Sell* factors by clear and convincing evidence. 15 M.R.S. § 106(4). “When the burden of proof is clear and convincing evidence, [the Law Court] review[s] the trial court’s findings to determine ‘whether the fact-finder reasonably could have been persuaded that the required findings were proved to be highly probable.’” *In re Walter R.*, 2004 ME 77, ¶ 17, 850 A.2d 346, (citation omitted) (review of civil involuntary commitment order). *See also State v. Dechaine*, 2015 ME 88, ¶ 13, 121 A.3d 76, (same standard articulated for review of findings of fact that must be proved by clear and convincing evidence on defendant’s motion for new trial pursuant to post-conviction DNA statute).

Other issues briefed by the parties include whether the motion court’s order complies with the statutory requirement to make findings on each of the statutory factors, whether the court’s order is sufficient for appellate review, and whether a proceeding or inquiry to address medication for purposes outlined in *Washington v. Harper*, 494 U.S. 210 (1990) was a necessary prerequisite to the order under section 106. *Amicus* suggests that the court’s Order complies with the statute, and addresses the *Harper* issue only to point out that such proceedings, if called for,

would occur in the context of an administrative proceeding pursuant to 15 M.R.S. § 107.

ARGUMENT

I. A motion court's determination, pursuant to 15 M.R.S. § 106, that a criminal defendant be medicated over the defendant's objection for purposes of achieving or restoring competency is a mixed question of law and fact, calling for deferential review of the factual findings, and *de novo* review of the application of the legal standards.¹

Mr. Awad's unfortunate circumstances presented the motion court with the dilemma Maine's recently enacted 15 M.R.S. § 106 was designed to address. The statutory construct, explicitly modeled on *Sell v. United States*, 539 U.S. 166 (2003), sets out not only the process, but the specific factual findings and legal conclusions a court must make in order to authorize involuntary medication to attempt to restore or achieve a defendant's competence to proceed with the criminal process. P.L. 2015, ch. 325 (emergency, effective July 7, 2015), *An Act Regarding the Treatment of Forensic Patients: Hearing on L.D. 1391 Before the J. Standing Comm. on Crim. Justice & Public Safety*, 127th Legis. (2015) (Rep. Richard Malaby, Bill Sponsor; Dr. Brendan Kirby, Clinical Director, Riverview Psychiatric Center, DHHS).

¹ The State's and Defendant Awad's briefs cite to and summarize the holdings of the federal Circuits that have addressed the standard of review. This brief seeks to supplement but not repeat that briefing by offering references to Maine cases addressing the applicable standard of review in analogous inquiries.

If the court finds “by clear and convincing evidence that the involuntary administration” of medication is “necessary and appropriate,” it must make findings addressing each of these factors. 15 M.R.S. § 106(4). The necessary implication under the statute (applying *Sell*) is that the court must find in the affirmative with respect to each factor; the court should not balance negative findings on one prong against others to arrive at a decision.

Chapter 325 also established a process for seeking involuntary medication of forensic patients (those in the custody of the Commissioner pursuant to 15 M.R.S. § 101-D or § 103) for purposes other than restoring competency; these are sometimes referred to as *Harper*-type proceedings, after *Washington v. Harper*, 494 U.S. 210 (1990). 15 M.R.S. § 107(3).² Such processes were already in place for civilly committed patients. 34-B M.R.S. § 3861(3) (involuntary treatment by decision of clinical review panel); 34-B M.R.S. § 3864(7-A) (court hearing).

The ultimate determination in this case—whether to medicate defendant over his objection to restore or achieve competency—is a legal determination akin to conclusions regarding voluntariness and whether a person has validly waived

² While the *Sell*-type proceeding under section 106 is designed for competency purposes, the *Harper* proceeding under section 107 addresses the appropriateness of involuntary medication where the forensic patient “poses a substantial risk of harm to self or others or there is a reasonable certainty that the patient will suffer severe physical or mental harm as manifested by recent behavior demonstrating an inability to avoid risk or to protect the patient adequately from impairment or injury.” 15 M.R.S. § 107(3)(B), (H). The testimony before the Legislature’s Committee of jurisdiction specifically referenced *Harper*. *An Act Regarding the Treatment of Forensic Patients: Hearing on L.D. 1391 Before the J. Standing Comm. on Crim. Justice & Public Safety*, 127th Legis. (2015) (Rep. Richard Malaby, Bill Sponsor; Dr. Brendan Kirby, Clinical Director, Riverview Psychiatric Center, DHHS).

Miranda, and should be subject to *de novo* review by the Law Court. Like these issues, however, the inquiry is intensely fact-based, and those factual findings should be subject to deferential review by this Court. See, e.g., *State v. Coombs*, 1998 ME 1, ¶¶ 7-9 (voluntariness); ¶ 13 (*Miranda* waiver); 704 A.2d 387 (factual findings reviewed for clear error; uniquely legal dimension of conclusions of voluntariness and waiver call for independent appellate review). The narrow interstices of fact and law intrinsic to the inquiry give rise to the focal point of this appeal—the extent to which the first two of the five prongs of section 106 are factual findings entitled to deference, or legal conclusions that this Court reviews *de novo*.

A court's legal conclusions are sometimes described as the application of legal principles to historical facts. This Court, in *State v. Cefalo*, 396 A.2d, 233 (Me. 1979), articulated the difference between historical facts subject to deferential review and the legal conclusions drawn from those facts in the context of challenges to pretrial identification procedures and witness identification:

The determination of the second question, *i.e.*, the proper standard of appellate review to be applied to the trial court's findings regarding either the suggestiveness of the pretrial identification procedure or the reliability of a witness' identification of the defendant, rests on a recognition that the lower court's resolution of these issues requires two steps. First, the trial judge must find "historical facts," *i.e.*, facts "in the sense of a recital of external events and the credibility of their narrators." *Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 97 L.Ed. 469 (1963) (Opinion of Mr. Justice Frankfurter). Second, he must draw legal conclusions from these facts. For example, historical facts

bearing on the question of the suggestibility of the August 16, 1977 identification procedure in the instant case include: the number of pictures in the photographic array; the ages of the men depicted; any comments the investigating officer may have made to the witness; and any other factors which may have drawn the prosecutrix's attention to defendant. Similarly, historical facts relevant to the issue of whether the prosecutrix's in-court identification has a basis independent of the unnecessarily suggestive mug shot showup of October 30, 1977 include: the number and length of the prosecutrix's opportunities to view her assailant; the adequacy of the lighting on each occasion; and the prosecutrix's own assessment of her ability to identify defendant. Since the presiding justice was present at trial and had the opportunity to view the witnesses, the Law Court affords his findings of historical facts considerable deference.[footnote omitted]

In contrast, as the Supreme Court noted in *Neil v. Biggers*, supra 409 U.S. at 193 n. 3, 93 S.Ct. 375 n. 3, where the challenge is to the legal conclusions drawn from historical facts, "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." On such issues, the Law Court is in as good a position as the trial judge to determine whether the historical facts warrant a legal conclusion that the pretrial identification was unnecessarily suggestive or that an independent basis exists for the witness' identification of defendant. Moreover, the Law Court has a special responsibility to exercise its independent judgment to determine the validity of legal conclusions that are dispositive of a defendant's claim that he has been denied fair treatment in a criminal proceeding [footnote and citation omitted].

Accordingly, we hold that a trial judge's findings of historical facts on relevant identification issues will be overturned only when clearly erroneous. The legal conclusions drawn from those facts, however, are subject to the independent examination and judgment of the Law Court.

State v. Cefalo, 396 A.2d 233, 239-40 (Me. 1979). Civil involuntary

commitment orders are similarly reviewed as mixed questions. *In re Walter R.*, 2004 ME 77, ¶ 17, 850 A.2d 346 (review of factual findings proved to standard of clear and convincing evidence); *In re Marcial O.*, 1999 ME 64, ¶ 14, 728 A.2d 158 (commitment order reviewed on questions of law; factual findings not set aside unless clearly erroneous). This Court should apply the principles of appellate jurisprudence it has articulated to review the findings and conclusions as described below.

The first factor is whether “[i]mportant state interests are at stake in restoring the defendant's competency.” 15 M.R.S. § 106(3)(B)(1). Whether or not state interests are important is a legal conclusion. However, the historical facts underlying the question include the nature of the charges against the defendant, the institutional confinement to which the defendant may be subject, and the time the defendant has already been confined and for which he may receive credit on any criminal sentence. *United States v. Sell*, 539 U.S. at 180. Any findings by the court on these facts are entitled to deferential review. Thus review of this factor, a mixed question of law and fact, calls for this Court to apply two standards, deferring to the motion court’s determination of the historical facts, and looking anew at the application of the legal principle to those facts. To this end, additional legal principles may be relevant—the State’s interest extends not just to confinement, but to the purposes outlined at the beginning of Part 3 of the Criminal

Code, 17-A M.R.S. § 1151, and to the essential role of the State in ensuring that guilty persons are held accountable based on proof beyond a reasonable doubt, that innocent persons are not convicted, and that incompetent and criminally insane persons are not held criminally responsible.

The second factor appears, at first blush, to require application of legal principles, in that it calls for a determination of whether state interests will be “furthered”—the court must determine whether “[i]nvoluntary medication will significantly further important state interests, *in that the medication proposed*:

- (a) Is substantially likely to render the defendant competent to proceed; and
- (b) Is substantially unlikely to produce side effects that would significantly interfere with the defendant's ability to assist the defense counsel in conducting the defendant's defense.

15 M.R.S. § 106(3)(B)(2) (emphasis supplied). The construction of this provision is telling. The qualifications in (a) and (b) that follow “in that the medication proposed” necessarily limit the court’s inquiry to factual questions regarding the likeliness of competency being achieved and the likeliness of side effects. This Court has noted that determinations of competency are factual determinations reviewable for clear error. *State v. Lewis*, 584 A.2d, 622, 624-25 (Me. 1990); *State v. Perkins*, 518 A.2d 715, 716 (Me. 1986) (“Since the justice fully inquired into the question of defendant’s competence to stand trial, we review his factual determination

by a ‘clearly erroneous’ standard.”). The question of whether a particular medication is “substantially unlikely to produce side effects that would significantly interfere” with a defendant’s ability to assist trial counsel is again a uniquely factual question that will turn on the evidence regarding any number of circumstances, *e.g.*, the specific medications, the individual’s treatment history and prognosis, and whether the individual has other issues such as cognitive limitations or a personality disorder.

Factors (3) and (4) of Maine’s section 106 together make up the third *Sell* factor. These two inquiries—whether “[i]nvoluntary medication is necessary to further important state interests” and whether [a]ny alternate less intrusive treatments are unlikely to achieve substantially the same results” are alternate formulations of the same question. 15 M.R.S. §§ 106(3)(B)(3)-(4). The *Sell* Court treated them as one, *Sell v. United States*, 539 U.S. at 181, and the motion court’s Order in this case incorporated its findings on the third factor in its findings on the fourth factor. (Order, App. 46). Both parties agree and the case law cited by them supports deferential review of this factual finding. The dispute between the parties here is one of sufficiency of the evidence, and is not further addressed by *Amicus*.

The issue is again one of sufficiency with respect to the fourth *Sell* factor, and final provision of Maine’s statute: whether the “administration of the proposed

medication is medically appropriate, as it is in the defendant's best medical interest in light of the defendant's medical condition.” 15 M.R.S. § 106(3)(B)(5). Again, the parties agree that this factual finding is entitled to deference and is reviewable for clear error, though Defendant Award argues that the finding itself is insufficient. Because the State’s burden was to establish the factor by clear and convincing evidence, this Court should consider whether the motion court, as fact-finder, reasonably could have been persuaded that it is highly probable that administration of the medication is in Mr. Awad’s best medical interest in light of his condition.

II. The motion court’s Order complies with the requirement in 15 M.R.S. § 106 to make findings on each of the statutory factors and is sufficiently specific for review by this Court.

The court introduced the Order by stating that its findings and conclusions were being made by clear and convincing evidence, and that its Order was based upon the findings and conclusions next recited. (Order, App. 41) The Court went on, as required by section 106, to explicitly make findings addressing each of the factors underlying the decision of whether to authorize involuntary medication, identifying each finding in order of and with reference to the statute. (Order, App. 45-47); 15 M.R.S. § 106(4) (The court “...shall make findings addressing each of the factors in subsection 3, paragraph B...”). The court’s Order complies with the statute.

Whether these findings are sufficient for appellate review is a separate matter. “When findings are required by statute, they ‘must be stated with sufficient specificity to permit understanding and meaningful appellate review.’” *Cookson v. State*, 2011 ME 53, ¶¶ 8-9, 17 A.3d 1208, 1212 (citing *Schwartz v. Unemployment Ins. Comm'n*, 2006 ME 41, ¶ 10, 895 A.2d 965, 970). However, Defendant requested no additional or special findings. Therefore the Law Court should assume that the motion court made the findings necessary to its decision on appeal, if those findings are supported by the record. *See State v. Black*, 2007 ME 19, ¶ 26, 914 A.2d 723 (Alexander, J., dissenting, summarizing “Constraints of Appellate Jurisprudence”) (“...[W]hen sufficiency of findings is at issue, and there has been no request, pursuant to M.R.Crim. P. 23(c), to ‘find the facts specially,’ we will infer that the trial court made all the findings necessary to support its judgment, if those findings are supported by the record. [citing] *State v. Dodd*, 503 A.2d 1302, 1307 (Me.1986) (inferring essential finding of recklessness to support aggravated assault conviction, when no mens rea finding was stated on the record); [and citing] *accord* 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 23.7 at V-43 to V-44 (Gardner ed.1995)”).

The court identified and noted the serious nature of the crimes with which Mr. Awad has been charged, and articulated its determination regarding the state interest, while acknowledging the deprivation of liberty associated with forced

medication. The court, in its factual findings, summarized the testimony of the three psychiatric providers who testified and their reports, admitted into evidence. The court referenced Mr. Awad's diagnoses; the experts' opinions as to whether competency could be restored; the observed positive responses to "sub-therapeutic dosage[s]" of medication; and the possibility of side effects and medications available to address those. The court imposed requirements on the treatment providers, addressing the nature and frequency of documentation—to the point of requiring that progress notes address the type and dosage of medication, the method of administration, and all effects of the medication, and that these notes be provided to the court and the parties weekly. The court further required thirty-day reviews by the State Forensic Service, and a status conference with the court within three months of the order, unless sooner requested by the parties. (The order was signed March 22, 2016; status conference was to be held on "the first available date in June" to review results of treatment.) (Order, App. 41-47)

Although some courts have required that a *Sell* order specifically identify medication and maximum dosages, *see, e.g., United States v. Chavez*, 734 F.3d 1247 (10th Cir. 2013); there is no constitutional requirement under *Sell* or statutory requirement under section 106 that the motion court enter the clinical realm of prescribing specific psychiatric medications.³ The frequency and specificity of the

³ It was clear from the testimony that Nurse Practitioner Davidson was discussing a particular "atypical

reporting required by the court enable it to retain its judicial oversight role, and to quickly impose further parameters or conditions as may be appropriate.

III. The motion court appropriately addressed the issue of involuntary medication for competency purposes pursuant to 15 M.R.S. § 106 in the absence of prior proceedings under 15 M.R.S. § 107.

The Supreme Court provided in *Sell*, “We consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.” *Sell v. United States*, 539 U.S. at 183. Defendant Awad argues for the first time on appeal⁴ that the court was required to make an inquiry under *Washington v. Harper*, 494 U.S. 210 (1990), as to whether or not involuntary medication of the defendant might have been appropriate on some other grounds. There are strong policy reasons for conducting such an inquiry where appropriate. *Sell*, 539 U.S. at 182. However, a

antipsychotic medication for the treatment of psychosis”—a “second-generation medication” called Zyprexa—and Cogentin, for side effects—that would be appropriate for Mr. Awad. (Tr. 70- 75, 84-85, 108-111). Improvements noted in his symptoms and possible side-effects were discussed with reference to these specific medications. The Order is not open-ended: “Medication may be switched to other medications within the class of medicines testified to by Ms. Davidson to maximize positive results and minimize deleterious side effects.” (Order, App. 47) This restriction necessarily limits the court’s Order to authorizing the type of medication specifically discussed for Mr. Awad at hearing, and not permitting the substitution of completely different classes of medication. (Tr. 114-15)

⁴ Neither counsel for Mr. Awad argued this issue to the motion court.

Harper inquiry does not appear to be a prerequisite for a *Sell* request to involuntarily medicate if there are no facts that would render it appropriate to medicate a patient for these alternative purposes.

The hospital had available to it, and did not pursue, the process to authorize non-emergency involuntary medication pursuant to 15 M.R.S. § 107(3), enacted at the same time as section 106. P.L. 2015, ch. 325 (emergency, effective July 7, 2015). Section 107 provides the hospital with a mechanism to obtain non-emergency authorization for involuntary medication of forensic patients where there is a substantial or reasonably certain risk of harm to the patient or others. Sub-section (3) does not address competency. 15 M.R.S. § 107(3).

There is no dispute that Mr. Awad is extremely ill and difficult to engage in treatment. However, the record reflects and the court noted that he attended the hearing lasting the entire day without incident (Tr. 173), and Mr. Awad stated clearly, apparently responding to testimony elicited in his presence, that he did not want to take medications. (Tr. 133, 140). The statement of Miriam Davidson attached to the State's motion (App. 52) and Miriam Davidson's testimony indicate that the only current reason to proceed with involuntary medication was to restore

competency. (Tr. 94) It has apparently been sufficient to invoke the emergency procedures available to the hospital to medicate Mr. Awad temporarily to address those circumstances where he has become dangerous.⁵ (Tr. 68); 15 M.R.S. § 107(4). *See also In re Christopher H.*, 2011 ME 13, ¶ 3 n. 1, 12 A.3d 64. On this record, the court had sufficient basis to go forward with the State's motion to involuntarily medicate for purposes of restoring competency.⁶

⁵ Someone on the treatment team or within the hospital had sought to have a guardian appointed; Nurse Practitioner Davidson testified that guardianship had been "denied," but that process was not described, except to note that the approach under *Sell* was considered "less intrusive." (Tr. 125-26)

⁶ *See United State v. Hernandez-Vasquez*, 513 F.3d 908, 913-15 n. 2 (9th Cir. 2007, amended 2008) (*citing* cases requiring inquiry where there is evidence of dangerousness but not requiring inquiry where such evidence does not exist).

CONCLUSION

The ultimate determination as to whether to involuntarily medicate the defendant for purposes of restoring competency calls for the application of legal principles to historical facts. The motion court's legal conclusions are reviewed *de novo*; the findings of historical facts are reviewed for clear error. The motion court's Order addressed each of the statutorily-required factors and is sufficient for appellate review. The record presented to the court supported its consideration of the State's motion to conduct the *Sell* inquiry under section 106.

Respectfully submitted,

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I, Laura A. Yustak, Assistant Attorney General, Attorney for Respondent, certify that I have served two copies of Appellee's Brief by depositing same in the U.S. Mail, postage prepaid, to Scott Hess, The Law Office of Scott Hess, LLC, 72 Winthrop Street, Augusta, ME 04330; Kate E. Marshall, Office of the District Attorney, 95 State Street, Augusta, ME 04330; and Zachary Heiden, American Civil Liberties Union of Maine, 121 Middle Street, Portland, ME 04101.

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